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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 955

JOHN J. FELICE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit.

Petitioner above-named prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on January 9, 1963.

CITATIONS AND OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Ohio, Eastern Division, entered May 10, 1961, is unreported, and is printed in (443a).[1]

The judgment and commitment of John J. Felice, entered June 27, 1961, is unreported, and is printed in (457a).[1]

The opinion of the United States Court of Appeals for the Sixth Circuit, entered January 9, 1963, is reported at 311 F. 2d 934, and is printed in Appendix "A" hereto

[1] Numbers in parentheses are references to the Appendix of Appellants.

(*infra*, p. 54). The judgment of the United States Court of Appeals for the Sixth Circuit, entered on January 9, 1963, is unreported, and is printed in Appendix "B" hereto (*infra*, p. 72).

The Order of the United States Court of Appeals for the Sixth Circuit denying Petition for Rehearing was entered on February 12, 1963, and is printed in Appendix "C" hereto (*infra*, p. 73).

JURISDICTION.

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 9, 1963. Petition for Rehearing was timely filed, and was denied February 12, 1963. The jurisdiction of this Court is invoked under 28, U. S. C., Sec. 1254(1). Extension of the time within which to petition for certiorari was granted on March 8, 1963, by Mr. Justice Stewart, extending Petitioner's time for the filing of this writ to the 29th day of March, 1963.

QUESTIONS PRESENTED.

1. When a Court of Appeals reverses conviction and orders acquittal of one of several co-defendants jointly found guilty on trial by a United States District Judge sitting without a jury, whose ruling rested in great part upon his finding that acts by the acquitted defendant were done with knowledge of the plans of, and in furtherance of the designs of the others and therefore evidence of the guilt of all, the reversal being ordered for the reason that such finding was not based on the evidence; is not reversal of petitioner's conviction required inasmuch as substantial doubt is per se raised as to whether the trial judge would have found petitioner guilty had he interpreted the

evidence as required by the ruling of the Appeals Court (especially when such a doubt is further expressed in the trial judge's comments upon motion to mitigate made by another co-defendant)?

2. Does the evidence in this case permit a conviction of the petitioner within the meaning of Section 302(d) of the Taft-Hartley Act requiring "willful violation"?

3. Where the President of a corporate employer makes a loan to a union representative of the corporation's employees, who in turn disclaims knowledge that the source of the funds was the employer, to what extent and subject to what proof may a court infer or find a violation of Section 302?

4. When a district judge sitting without a jury erroneously admits evidence of petitioner's execution of a Waiver of Restrictions on Assessment and Collection of Deficiency Tax (Form 870) and of his payment of such tax pursuant thereto and refers to such evidence in his findings as significant, may such error be dismissed as merely cumulative and corroborative?

5. May a trial court sitting without a jury fail to make rulings on objections to evidence made by a defense counsel?

6. If a transaction is made under the circumstances of the instant case, does a conviction of Petitioner violate the Fifth Amendment of the United States Constitution by retroactively amending in effect the then existing act to include the prohibitions against payments by others proscribed in the 1959 Amendment?

7. Was Petitioner's conviction warranted by evidence properly adduced, or was it, at least in part, grounded upon evidence improperly admitted?

CONSTITUTION AND STATUTES INVOLVED.

A. United States Constitution, Amendment V.

"No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *."

B. Statute Involved and the Amended Sections Thereof.

The Sections of the Labor-Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. 186(a) and (b), as it existed prior to their amendment[*] in 1959, and upon which the indictment herein was based are:

"Section 302(a) It shall be unlawful for an employer to pay or deliver, or agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce."

"Section 302(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, from the employer of such employees any money or other thing of value."

"Section 302(d) Any person who willfully violates any provision of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for no more than one year or both."

In 1959 Congress broadened the scope of Sections 302 (a) and (b) by amending same as follows:

---

[*] Section 505 amending Section 302(a), (b) and (c) of the Labor-Management Relations Act, 1947, contained in the current Act known as Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. 186.

"Section 302 (a).[3] It shall be unlawful for an employer *or association of employers or any person who acts as a labor relations expert, advisor, or consultant to an employer or who acts in the interest of an employer* to pay, *lend*, or deliver, or [to] agree to pay, *lend*, or deliver, any money or other thing of value—

"(1) to any representative of any of his employees who are employed in an industry affecting commerce[.]; or

"(2) *to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or*

"(3) *to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing;*

or

"(4) *to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.*

"Section 302(b) (1). It shall be unlawful for any [representative of any employees who are employed

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[3] *Ibid.* Portions of the Act eliminated by the Labor-Management Reporting and Disclosure Act of 1959, Public Law 86-257, are enclosed in black brackets; provisions which have been added to the Act are in italics; and unchanged portions are shown in roman type.

in an industry affecting commerce] *person to request, demand*, receive or accept, or [to] agree to receive or accept [from the employer of such employees] *any payment, loan or delivery of* any money or other thing of *value*[.] *prohibited by subsection* (a)."

STATEMENT OF FACTS.

A. Introduction.

Petitioner Felice, became the president and business manager of teamsters Local 293 in 1947 (266a).[1] Since that time, he has acted in that capacity in his relation with Pilsener (267a). Felice met Carter in 1946 before Carter left Leisy Brewing Company and became President of Pilsener (267a). In the course of time, Felice and Carter established a close personal friendship on a purely social basis (267a).

In February 1956, Felice became interested in two adjoining houses under construction which he contemplated buying, one for his family, the other for his son's. In connection with the financing of this purchase, he went to Broadview Savings & Loan Association and applied for a blanket mortgage on three pieces of property: the home in which the two families then jointly resided, and the aforesaid two houses under construction (268a).

Shortly before April 17, 1956, Felice and Carter were having dinner together at a restaurant. In the course of their conversation Felice mentioned to Carter that he was planning to buy two houses and to sell his own home, which was getting too crowded to accommodate both his own and his son's family. To consummate that transaction, Felice indicated that he thought he might need some

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[1] For convenience John J. Felice is referred to as "Felice," George S. Carter as "Carter," City Products Corporation as "City Products" and The Pilsener Brewing Company as "Pilsener."

money. Carter responsively said, *but without any request from Felice*: "If you do, see me" (268a).

About April 15, 1956, Felice learned that he needed $4,500.00 to complete the purchase of the two houses. Encouraged by Carter's personal offer of help, Felice told him that the bank required him to deposit $4,500.00 cash. Carter told him to give him a couple of days and to see him in his office (269a, 333a, 334a).

Unilaterally, without consulting with or informing Felice, Carter evolved a plan for obtaining the money for a loan to Felice from Pilsener and/or City Products. After first obtaining permission from one Zeidler, Treasurer of City Products, the "parent" company of Pilsener,[*] he told Nero, Divisional Comptroller for Pilsener in charge of accounting, that he was going to make a loan to Felice. According to Nero, Carter further informed him that the loan was not to be made by company check (25a). Nero prepared a voucher payable to The Cleveland Trust Company which he delivered to that bank (26a), receiving in exchange an official bank check in the sum of $4,000.00 made payable to John Felice (27a, 32a). The check, together with a bank cognovit note, Nero turned over to Carter at his office on the morning of April 17, 1956 (32a). Carter explained he was lending Felice $4,500.00 and an additional $500.00 was necessary. Nero prepared a cash slip which he handed to the Cashier of Pilsener who gave him $500.00 in cash (33a). The $500.00 cash Nero also delivered to Carter.

On April 17, 1956, Felice came to Carter's office pursuant to Carter's invitation. Carter gave Felice the bank

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[*] According to the record, Felice learned for the first time in July or August 1960, some four years later, that the $4,500.00 had originated from Pilsener and or City Products (269a, 270a, 271a)

[*] Zeidler was also a director of both companies and a majority of the Pilsener directors were directors of City Products.

check and the $500.00 cash. At the same time Carter asked Felice to sign a note prepared in Carter's handwriting in the sum of $4,500.00 made payable to George S. Carter. Felice signed the note (38a, 269a).

On April 19, 1956, Felice turned the bank check and the cash over to the Broadview Savings & Loan Company as a deposit on the two houses he was purchasing (93a, 94a).[1]

Felice consistently and unequivocally maintained that he had borrowed $4,500.00 from his friend Carter; e.g., when Internal Revenue Agent Meister spoke to Felice about this matter, Felice stated that he had "borrowed $4,500.00 from Carter" (135a).

B. The Indictment.

The Indictment against Felice charges that on April 17, 1956, he "willfully and knowingly" did "receive and accept" the sum of $4,500.00 from "employers" of employees engaged in an industry affecting commerce, which employees were represented by him, all in violation of Section 302(b) of the Labor-Management Relations Act, 1947, popularly known as the Taft-Hartley Act (4a, 5a). Carter, Pilsener and City Products were indicted under Section 302(a). The relevant acts having occurred in 1956, the indictments were returned under the interdictments pronounced by the act prior to the 1959 Amendments.

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[1] There is not a scintilla of evidence or a basis for a fair inference that Felice in any way attempted to conceal or suppress the fact that he had borrowed $4,500.00 from Carter. The acceptance of a check, the signing of a note and the deposit of the check plus $500.00 with the Broadview Savings & Loan Association certainly negate any such inference.

C. The Opinions and Judgments Below.

The case was tried before a district judge without a jury. At the close of the Government's case, Felice moved for acquittal on the ground that the Government had failed to introduce sufficient evidence to make out a prima facie case against him (204a *et seq.*). This motion he renewed at the end of the entire case on the ground that the Government had failed to prove beyond a reasonable doubt his guilt (405a).

A reading of the opinion and judgment of the United States District Court for the Northern District of Ohio, Eastern Division (443a to 449a inc.) reveals that all of the evidence relied upon by it in holding Felice guilty was evidence of a hearsay nature applicable, if at all, only to his co-defendants. After reviewing sketchily some of the evidence with reference to Pilsener, City Products and Carter, none of which could, in a criminal case such as this, be said to apply to Felice, the District Court in a sweeping disposal of the case against Felice concluded:

> "Upon a consideration of the second count of the indictment (that of Felice), the essential elements therein charged are somewhat similar to the elements of the offense charged in the first count. The first two essential elements as set forth above in connection with the first count in the indictment, as they also apply to the second count, have been proved beyond a reasonable doubt."
>
> "The third essential element in the second count of the indictment requires the Government to prove beyond a reasonable doubt that John J. Felice, a representative of the employees of the corporate defendants herein, did unlawfully, willfully and knowingly receive and accept from the corporate defendants and George S. Carter a thing of value, to-wit, money in the amount of $4,500.00."

"The evidence has proved beyond a reasonable doubt the third essential element of the second count of the indictment."

"As to the further element in the second count of the indictment requiring the Government to prove that the $4,500.00 was accepted and received by John Felice willfully and knowingly, this essential element has been proved beyond a reasonable doubt."

"It is my judgment and verdict that the defendant, John J. Felice, is guilty as charged in the second count of the indictment." (449a.)

On January 9, 1963, the United States Court of Appeals for the Sixth Circuit overruled the District Court's finding that Section 302 proscribed a loan of money; reversed the Court's conviction of one of the four co-defendants, City Products; and affirmed the Court's judgment concerning the other three defendants, including Felice. His petition for rehearing was denied on February 12, 1963.

D. Other Significant Facts.

(1) During the course of its investigation of his tax matters, the Internal Revenue Department insisted that the $4,500.00 loaned to Felice should have been declared as taxable income. Despite Felice's protests that this was a loan and not taxable income, upon advice of tax counsel (301a-306a), Felice paid the assessment (121a-141a). All this evidence and the evidence of execution of a "Waiver of Restriction on Assessment and Collection of Deficiency Tax" was admitted into evidence over objection (121a-128a, see especially 126a-127a).

(2) Without any explanation other than the bare facts of its accomplishment, evidence was adduced and admitted over objection (53a-54a), that City Products on

March 31, 1960, charged off as a bad debt the Felice note. This write-off occurred, it was stipulated, at the direction of Zeidler, Treasurer of City Products (64a-65a).

(3) The trial court not only admitted both the evidence as to the payment of the tax (1) and the write-off of the note (2), but considered them as most important, referring to both in his findings (446a).

(4) On February 8, 1963, after affirmance of his conviction by the Court of Appeals, Carter moved the trial judge for a mitigation of his sentence. (The Court of Appeals having reversed the conviction of City Products, holding (App. A, p. 63).)

> "It is further argued that because of testimony by Carter that he got the permission of Zeidler, secretary of City Products, to make the alleged loan to Felice and because the District Judge, despite Zeidler's denial, found as a fact that Carter "was authorized and directed by William Zeidler, a proper official of the City Products, to engage *in the transaction* here in dispute, prior to the delivery of the money to Felice," City Products is guilty as a principal. It is clear, however, that the only evidence of Zeidler's participation in the events occurring prior to and at the time of the alleged offense was his consent to Pilsener Brewing Company making a *loan* to Felice. We have held that a bona fide loan to a union representative was not proscribed by the statute, as it read in 1956. We do not believe the evidence would justify an inference that Zeidler, at the time he gave his consent, knew that such loan was but a cover for an illegal payment to Felice."

The trial court mitigated the sentence, ruling that Zeidler's permission and the charge-off by City Products of the note "was the essence of the events" leading to the convictions. The text of the trial court's comments is annexed as Appendix D hereto (*infra*, pp. 74 to 78).

REASONS FOR GRANTING THE PETITION.

Certiorari should be granted here for the reasons that (a) important questions of Federal law are raised by this appeal which have not been but should be settled by this court; (b) the Court of Appeals has made rulings in conflict with decisions of other Appellate Courts; (c) the courts below have departed or so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision; (d) elemental considerations of justice and constitutional law require reconsideration of the conviction of petitioner; (e) the record below far fails to substantiate the findings below and present a situation calling for the exercise of this Court's power of supervision; (f) the case presents important questions affecting the rights, duties and obligations of all labor unions, employers and employees, the determination and delineation of which is of great national concern and import; (g) the judgment below is erroneous and is grounded upon evidence improperly admitted and erroneously considered and interpreted.

Each of the above considerations is elaborated on in the ensuing discussion (Points I-VI *infra*).

I. THE REVERSAL OF THE CONVICTION OF DEFENDANT, CITY PRODUCTS, REQUIRES THE REVERSAL OF THE CONVICTION OF PETITIONER.

The reversal of City Products' conviction has so far tainted the record as to require a reversal of the conviction of Felice in the interest of an even handed and consistent administration of justice.

The trial court made two elemental findings of fact, both of which have been completely discarded and discredited by the Court of Appeals' ruling. The trial Court

found that when Carter spoke to Zeidler and obtained his approval of the transaction with Felice, he informed Zeidler that the transaction was to be a gift and not a loan, and that Zeidler, as a responsible officer of City Products, the parent company, gave his approval for a gift. The trial court found further that the subsequent write-off of the note by City Products, directed by Zeidler, came to pass as a concommitant of the approved gift; that Zeidler ordered the write-off because he had approved the gift, and that the write-off was proof of a gift. The above findings were made with respect to all the defendants and the trial court made it plain it was basing the convictions of not only City Products, Carter and Pilsener on these findings, but also the conviction of petitioner. The view and findings of the trial court was that all the defendants participated as principals in an illegal transaction and that all were guilty.

The Court of Appeals ruled that this evidence as to what City Products did (a) with respect to the approval of the transaction, and (b) as to the write-off of the note, *was completely misinterpreted by the trial court*; that Zeidler approved only a loan, and that the write-off was not proof of a payoff! Plainly, if the approval of Zeidler was for a loan and not a gift, and City Products innocently charged off a mere loan, then the evidence should have been considered in that light by the finder of the fact. Yet both of these were considered erroneously as indicia of Felice's guilt and were, in fact, considered as significant indicia of guilt by the District Court.

It is urged that as a result of the finding that the trial court erred in its interpretation of this evidence, serious doubts are cast upon whether there would have been a conviction of Felice, had the trial court properly interpreted the facts. This is a criminal case and conviction

can only be in accordance with the strict standard required in such cases. Further, these findings by the trial judge have even raised serious doubts as to whether a conviction could have obtained had such evidence not been considered erroneously by the court. In short, the findings and declarations by the trial court when considered in the light of the Court of Appeals' opinion, may require the entry of a judgment of acquittal, but in any event, justice would require a new trial be ordered.

The inconsistency of the Court of Appeals' final position as to the two defendants, City Products vis-a-vis John Felice, is a serious threat to the administration of justice and the repute in which the courts are held. That court's ruling would apparently permit a trier of facts to regard an action as being done by the actor innocently, and yet insofar as another defendant was concerned find that the actor had knowledge making the act criminal. While under certain circumstances (as control, direction, etc.), such result might obtain, the evil of the appellate court's ruling in the instant case, lies in the fact that the "doer's" state of mind is ruled to be one, insofar as it is considered vis-a-vis itself, and different vis-a-vis Felice. In other words, Zeidler either was approving a gift or he was approving a loan; and was writing off either a gift or a loan. It can't be that his state of mind was that he was approving a loan from City Products to Felice (insofar as City Products was concerned), and a gift to Felice at the same time; likewise, when he ordered the write-off, he either was of the impression that it was a gift or a loan that was being written off.

It is also worth noting that the Court of Appeals' ruling also ignores the fact that City Products and its officers were in fact the controllers of Pilsener's and therefor Carter's actions. Zeidler was a director and officer of Pilsener (332a) and, in fact, a more authoritative per-

sonage in its affairs than Carter. A careful reading of the record makes it plain that *Carter did not have the authority to give away Pilsener's money without the patriarchic approval of Zeidler or other power in City Products.* Thus assuming arguendo, chicanerous intent, the transaction had all the indicia of a loan, and until a gift was ratified by a City Products official, must be construed as one. To say it was a gift, but that the parties, who in the final analysis must have so regarded it in order for the gift to be effective, were unaware of the donative character but believed it to be a mere loan, is not realistic.

The trial court makes the argument most succinctly (Exhibit D) in his comments on the Motion in Mitigation by Carter:

> "Well, as you may have suspected from my remarks at the opening, the decision of the Court of Appeals—my reaction to it is not necessarily difficult to describe, but it seemed to me at the time and does now that in view of the findings of the fact which I made at the time of the decision in this court, and particularly in view of the findings of fact which I made at that time which implicated Mr. Zeidler who, in my opinion, was *as close to the modus operandi in this case as anyone*—in fact, as you say, Mr. Knachel, were it not for Mr. Zeidler and his not only first approving but his confirmation on the telephone to pay Felice the money, *that Carter this moment wouldn't have been in court.* And most important, in my judgment—now it can be that I am blinded to some facet of this case, but no one has shown me why, how, where, if at all, I failed to see what I should see. So I say, though someone may later say, 'Well, you must have been blinded to this,' I think I have given this matter thorough and painstaking consideration, and not only from the standpoint that I considered at the time of the trial Zeidler's action in approving the payment of the money, *but more particularly that the essence of the events was when City*

Products wrote this $4,500 off its books, at which time Carter wasn't even with the City Products. (Emphasis supplied)."

"*Now, if the Court of Appeals, as they have, discharged the City Products Corporation from culpability in this crime, I feel that it would be a serious injustice to impose a sentence on Mr. Carter.*"

Thus, as a result of the Court of Appeals' ruling substantial doubt has been raised as to whether Felice could and/or would have been convicted had the trial court correctly interpreted the evidence. Petitioner contends that at the very least, a new trial should have been ordered—if not a directed acquittal as is argued hereafter. In view of comments of the District Judge at the time he mitigated Carter's sentence, the denial of reconsideration to Felice would create a picture of the judicial process which should at all costs be avoided. For the trial court has said that the very essence of his finding of guilt rested upon his interpretation that approval and charge-off were given and ordered by Zeidler with full knowledge. The question is not, therefore, whether this judgment was influenced by an erroneous interpretation. The question goes beyond and strikes at the very core of the judicial process—are defendants to be treated equally and will justice be even handed? In the view of the trial court Carter has been unjustly, or at least unequally dealt with. Will Felice suffer likewise? The opinion of this Court on such an important consideration is indicated.

Parenthetically but included in the above, is the consideration of whether a fatal variance in dates does not arise as there could not be a gift until City Products actually wrote off the note—if in fact in view of the appellate court's ruling as to City Products a gift could be construed at all.

II. THE FAILURE OF THE DISTRICT COURT TO MAKE PROPER RULINGS ON OBJECTIONS TO THE ADMISSION OF EVIDENCE OR TO RESTRICT THE APPLICATION OF EVIDENCE TO THE PERTINENT DEFENDANT MAKES IT IMPOSSIBLE TO DISENTANGLE ADMISSIBLE FROM INCOMPETENT EVIDENCE AND VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT. THE COURT OF APPEALS' DECISION ON THIS POINT PERPETUATES THIS REVERSIBLE ERROR.

Rule 19 of the Rules of this Court, provides that among the reasons that this Court will grant certiorari is the case "where a court of appeals has * * * so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." Such a situation is here presented by reason of the Trial Court's conduct in relation to objections made and rulings requested by defense counsel.

Early in the trial, in response to certain objections, the trial court declined ruling in the following words:

> "The Court: Now, with regard to these objections of the nature Mr. Knachel just asserted the question as to the proper applicability of whatever may be shown by any answer as well as any document or exhibit is a subject that will call for careful and thorough preparation and application by counsel when you go to argue and present this case."
>
> *"The exhibit at the time that it is being offered, if it is authentic and properly identified, is being admitted either as being relevant or as tending to either make something else relevant if and when it does, or become relevant by supplementary evidence on the relevancy of the document itself."*
>
> "As I started to say a moment ago, there is some comparison between trying a lawsuit and building a house. Now, you can't say a house is built simply

because you bought the land and had the lumber and materials brought out on the site. As to whether or not a lawsuit has been made out, we have to wait until the Government says 'We rest.' So we can't expect that each question makes out a full case. Therefore, I am not indicating by overruling or sustaining objections or otherwise that whatever I am ruling upon is indicative of a case or that it is proof or that it isn't. It is simply this, that I think counsel as well as the (100) *Court* have got to receive these things piecemeal and *then determine in the end whether* or not they make a case, just as we would after the workmen get through and they say, well, here is a house. Whether it is a house that we contracted to buy or not, that is another question."

"So, actually, when I said that I would permit and receive and understand that objections could be had by counsel for the separate parties, I took it to mean that in the end *if this is not connected with any bit of evidence, is not connected with that particular defendant the Court will ignore it with respect to that* defendant." (Emphasis supplied, 51a, 52a) (See also 29a hearsay, 30a, hearsay, 113a, 119a, 120a, 297a, *the Court, not Government counsel*, prophesies that the evidence "will be connected up directly"; and 33a).

At the conclusion of the Government's case, upon request of defense counsel that the court rule so that counsel could properly proceed to presentation of defense testimony the Court piously proclaims:

"Now, it would appear to me that at this point there would be no necessity for the Court to catalog the various bits of evidence and testimony in the sense that the Court, for the benefit of counsel, would express the Court's views as that evidence applied to each defendant. On the contrary, I think the traditional manner and the manner which the Court should require in this case is that the respective defendants who interpose these motions be required to

state to the Court wherein they contend the Government has failed as to their particular defendant."

"That is the position the Court takes at this time and I will hear you separately in that fashion * * *" (203a, 204a).

The Court of Appeals lightly disposed of petitioner's contention that this action by the District Court prejudiced him (See App. A, pp. 70-71, point 8). Analysis of the action of the District Court reveals that its failure to properly fulfill its function cannot be dismissed with alacrity.

The Court admitted evidence "either as being relevant or *as tending* to either make something else relevant *if and when it does*, or become relevant by supplementary evidence * * *." (Emphasis supplied, 51a.) How is counsel to disentangle such labyrinthian ruling? or to know which one of these three different criteria the court relied upon in admitting certain evidence when the Court would rule that such evidence was admissible, but would not, as it did not, specify the grounds of admissibility? or to know whether the evidence applied to the defendant with whose defense he was entrusted? Such criteria afforded the judge an *easy* method of avoiding rulings; but it deprived defense counsel of an opportunity to (1) exclude prejudicial and improper evidence, (2) prepare and present a proper defense and (3) lay a foundation for appeal, in view of the ingeniously generic and sweeping language of the court.

Likewise, the court's statement that it would have to make a determination "in the end"; and "in the end," if evidence "is not connected with any bit of evidence, is not connected with any particular defendant, the court will ignore it with respect to that defendant." (52a.) In the meantime, i.e., prior "to the end," counsel was disabled from knowing, to use the language of the Court of Ap-

peals, how "to go forward or attack the sufficiency of his opponent's case." The Court of Appeals found that the trial court "did not do so," i.e., rule even "at the close of the government's case" App. A, p. 70.

The Court of Appeals' argument that "counsel did not point to any instance where such failure to rule prejudiced any defendant," overlooks the fact that when a court refuses to rule, saying it will ignore evidence which it should not consider, the court *deprives counsel of even knowing what evidence it is considering.* Counsel could not, of course, know what effect proposed evidence would have on the thought-processes of the District Court as a result of the labyrinth of reserved rulings. Because the labyrinth created three different criteria, counsel would not know whether the Court was admitting the evidence, was admitting it subject to connection, or as pertinent to another defendant. And, at the close of the Government's case, its refusal to rule left each counsel with a hopelessly insoluble problem! It is easy to say that an accused has a right to counsel, the deprivation of which right violates due process—is it not equally abusive to destroy the possibility of effective counsel? What value has a lawyer to a defendant if the court hears all proffered evidence, secretly in the still recesses of his mind supposedly culling out the chaff?

It is submitted that such a method of treating evidence is a violation of the due process requirement. There is no defense to such a method of treating evidence and objections, as that adopted by the District Court; no fair trial can take place under such a method. This is not due process of law as we know it, and the Court of Appeals did not rectify this denial of procedural and substantive due process.

Due process of law is not, of course, a guarantee that

a court shall not commit errors in law or in fact. However, where, as here, proper objections were raised on behalf of Felice to admissibility of improper evidence, the failure of the court to rule is fatal to the requirements necessary to meet the minimal standards of a fair trial. Especially when the District Court not only fails to rule on evidence, but even refuses to do so ignoring the objections of defense counsel. (199a *et seq.*)

When the Trial Court rendered its opinion, it *en passant* touched lightly on the objections and then went on to rule that Felice was guilty. A ruling at that late stage of the proceedings, i.e., during the rendering of an opinion, is not due process in the orderly administration of criminal justice but rather a denial thereof. But even at that stage, where at least it would enable a reviewing court to decide if improper evidence was relied on, the District Court does not spell out what evidence it considered and which it ignored.

On balance, the benefits to be derived by this Court's upholding such conduct are far outweighed by the sacrifice that approval of such conduct would have on that paramount interest, guaranteed by the Constitution,—the protection of an individual's rights to orderly and unconfused trial.

The Court of Appeals when it said, *inter alia*, that it did not approve "of a trial judge's practice of repeated postponing of decisions on evidentiary matters by reserving a ruling thereon," recognized the paramount importance of such interests. Parenthetically it then stated that this was not "the situation here." Examination of the record warrants the opposite conclusion.

True, if the District Court is asked "*to catalog the various bits of evidence and testimony* in the sense that the court, for the benefit of counsel, express the court's views

as that evidence applied to each defendant." (emphasis supplied), it would have cause to complain. But *this is not what counsel had asked* the Court to do. Since this is the crux of the issue, petitioner may be forgiven in reiterating that when a trial court admits conditionally objected to evidence subject to subsequent proof, it has an obligation at some time, and at least by the close of the government's case, to determine the question of admissibility. *This* petitioner asked and was entitled to.

Nor did defense counsel seek "to take the whole mass of evidence that has been introduced in the trial and throw it in (his) Honor's lap * * *" (200a). All he wanted was for the District Court to rule on objected evidence preliminarily introduced subject to subsequent connection. The District Court, in fact all courts, have the obligation of fairly conducting trials, however complicated or varied they may be. A court cannot shirk this responsibility. It must be meticulously faithful to its function of satisfying the obligation it undertakes of insuring that the trial is properly, fairly and diligently conducted. An essential element in any search for justice and due process is a fair trial. The method adopted by this District Court of dealing with evidence does not constitute such a fair trial.

This procedure is, of course, much easier for the Trial Court. The arduous task of ruling on whether the line of testimony has been connected is avoided. True, the task becomes more formidable each time the Court refrains from passing on the question of connection for the instances accumulate. It is of course, easier for the Court to then refrain from passing as to each instance on whether the objected evidence has been connected. But where does such procedure leave the evidence? And what conclusion is to be drawn by counsel as to what is in evidence against his client?

The question before this Court is not whether it could or would arrive at a conclusion different from that which the trial court reached. This Court must decide whether, having in mind a fair trial, the procedure of the trial court must be discouraged or encouraged. Nor is this a novel approach.

In *Asbury v. Hinklin*, 181 Mo. 658 at page 670:

> "The practice of hearing evidence subject to objection, reserving the ruling until the decision of the case, is erroneous, and is ground for reversal if the evidence is material and exception is preserved. And even when exception is not taken, if the evidence is incompetent and is of such a character as is justly calculated to influence the mind, the fact that it was received and retained while the cause was held under advisement is a fact to be weighed by the appellate court when it is balancing the conflicting evidence and considering to what extent deference should be given to the finding of the trial judge. The chancellor himself does not know what influence the evidence may have had on his mind, and even though he concludes in the end to reject it as incompetent, yet it is liable to leave its impression."
>
> "Besides, the party who has made the objection is left in a dilemma, not knowing whether to meet the testimony with testimony of like character to the contrary, or to trust to the final ruling on his objection in his favor."

Doe v. Lucy, 83 N. H. 160, at page 165, states the necessity for a timely ruling on objections cogently:

> "The foregoing discussion indicates the danger involved in the practice of making provisional rulings upon items of evidence, especially when applied throughout a trial to a very large number of contested questions as in the present case. Although the law assumes that a fact-finding tribunal may, by conscious effort, rid its individual or collective mind of

the impression produced by a piece of evidence improperly admitted (*Mason v. Knox, supra* and *Burnham v. Butler*, 58 N. H. 568; *Judge of Probate v. Stone*, 44 N. H. 593, 607), it is obvious that there must be a somewhat close limit to the burden which can thus be placed upon the selective faculty of the trier and if a sufficiently large quantity of logically convincing but inadmissible evidence is placed before a tribunal under provisional rulings, the possibility of erasing its impression by a final ruling may vanish and a mistrial will result."

Likewise, the case of *Lopez v. Valdez*, 32 R. I. 644, where the Court said:

"A decision on these objections was thus left in abeyance and the trial terminated without a resolution of the questions presented. * * * We are of the opinion that this procedure was prejudicial to the interests of the Appellant. Parties who offer objections to questions on whatever ground are entitled to a ruling at the time objections are made, unless they present a question with regard to which the Court desires to inform itself before making its ruling. In that event it is perfectly proper for the Court to take a reasonable time to study the question presented by the objection; but a ruling should always be made during the trial and at such time as will give the party against whom the ruling is made an opportunity to meet the situation presented by the ruling."

III. CONVICTION OF PETITIONER UNDER THE INSTANT CIRCUMSTANCES VIOLATES THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES IN THAT THE DECISION IN EFFECT AMENDS THE THEN-EXISTING ACT TO INCORPORATE THE PROHIBITIONS ADDED BY THE 1959 AMENDMENTS TO THE ACT.

Since the operative facts in this matter occurred prior to the 1959 amendments to Sections 302 (a) and (b), those sections as amended could not be constitutionally applied to the transaction involved; conviction if at all must arise under the language of the original enactment.

The Congressional intention in Sections 302(a) and (b), prior to the 1959 amendment, was clearly to prohibit payments by an employer to a union representative. It was not intended that the prohibition reach sources other than the employer itself.

It was the 1959 amendment of this statute which was designed to bridge the gap between the employer and the hierarchy of employer representatives who act as "labor relations expert, adviser or consultant to an employer *or who acts in the interest of an employer.*"

The intent to broaden the sweep of the Act in this respect clearly emerges from the discussion contained in the Senate Report No. 87 at page 2327 where it is stated:

> "Under the bill, the management middlemen who make illicit payments can be prosecuted without proof that payments were authorized or ratified by the employer or otherwise within the scope of the middle man's employment."

The Report goes on to explain:

> "The intent of these Amendments to Sections 302(a) and (b) is to forbid any payment or bribe by an employer or (sic, of?) anyone who acts in the interest of an employer, whether technically an agent

or not, and to forbid the receipt of any such bribe by any person, whether an individual, an officer, or employee of a labor organization or a committee, representing employees."

It is obvious that the Congressional architects of the 1959 amendment regarded Sections 302(a) and (b) without amendment merely as proscribing the payment of funds made by an employer. Moreover, they apparently interpreted the decision of the Supreme Court in *U. S. v. Ryan*, 350 U. S. 299, as supporting this view of the Act in its unamended state.

Therefore, to come to the conclusion that the mere acceptance and receipt by a union representative of money or a thing of value *from a middleman*, even if the receiver is unaware, or absent clear proof that he is aware, that the money derives from the employer constitutes a violation of Section 302(b) is to declare, in effect, that the 1959 amendments were mere surplusage that left the meaning and coverage of the Act unchanged. It cannot reasonably be said that Congress here engaged in such futile and aimless verbalisms. Moreover, even considering the added language of the 1959 amendments quoted above, it is clear that we are confronted with a broad amorphous group of individuals with whom a union representative must act at his peril in any transaction no matter how trivial it may be.

It must be borne in mind that we are dealing with a criminal statute. *Bianchi v. United States*, 219 F. 2d 182 (C. A. 8). As such it must be reasonably construed to effectuate the purpose of Congress and not stretched to engulf areas beyond the limits of the existing legislation.

The interdiction of receiving and accepting of moneys from an employer under pre-1959 Section 302(b) should not be applied to a large indeterminate body of manage-

ment employees, inclusive of individuals whether or not labeled employees; thus leaving the union representative, such as Felice in this case, acting solely at his peril, in any transaction with any employer representative, agent or employee, (though he was unaware that the source of the money involved in the transaction was the employer).

As suggested in *Ryan, supra*, Congress may forbid all transactions between employer and employee as a precaution against bribery. It may not, however, create a vast body of indeterminate "agents" with whom one may deal only subject to the "varying views of the different courts and juries which may be called on to enforce" the statute. *U. S. v. Cohen Grocery Co.*, 264 F. 218.

A penal statute must set up "ascertainable standards of guilt." One should not be required to guess at the meaning of a criminal statute either as to persons within its scope or as to applicable tests to ascertain guilt. *Winters v. New York*, 333 U. S. 507, 515.

To apply Section 302(b) in the manner here done by the Government against Felice is unconstitutional in that it creates an unwarranted assumption in violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

It is unreasonable, in the light of the language of the statute involved, gratuitously to assume that the term employer includes agents or representatives of the employer and, *a fortiori*, that the statute covers or was intended to cover a broad amorphous group of individuals and their commercial transactions. Presumptions which go beyond the scope of logical inference are unconstitutional. *Tot v. United States*, 319 U. S. 463 (1943).

There are thus the dual infirmities in the application made of this criminal statute to Felice (a) that it is required of him to have read into the law that the

prohibition of dealing with his employer applied equally to the whole hierarchy of employer agents, representatives and employees who might conceivably be acting on its behalf and (b) that he was further required to make the assumption that the $4,500.00 which he received from Carter and for which he executed the note payable to Carter were funds derived from Pilsener and/or City Products. Such a loose, vague and uncertain interpretation of Section 302(b) deprived Felice of the due process guaranteed to him by the Fifth Amendment to the United States Constitution and thereby rendered the said Section 302(b) unconstitutional as applied.

Referring to such argument, the Court of Appeals states in its opinion: "We are not sure that we fully understand the basis of such claim." The Court then goes on to rely upon Section 2(2) of the Act (29 USCA Title 152) which defines the word "Employer" as including anyone who acts on an employer's behalf. But if that section were controlling here, the 1959 amendments addition to Section 302 of the proscription against the prohibited payments by anyone who "acts in the interest of an employer" was pure surplusage.

But Section 2(2) is not controlling here! Such section in context is intended to determine employer liability for the acts of an agent. It does not go so far as to determine third party responsibility and categorically to affix liability upon one dealing with such an agent.

However, just as the question of whether a bona fide loan was proscribed prior to the 1959 amendments was laid to rest by the Court of Appeals herein, so, too, should this question be decided. *Only direct dealings with an employer were proscribed prior to 1959.* The 1959 amendments added, for the first time, the so-called middleman, or person who acts in the interest of an employer to the proscribed class.

We call the Court's attention to the language of the Court of Appeals in the instant case:

> "We do not find, in the language employed, a Congressional intent to make a bona fide loan between parties described in the statute a crime. Congress, itself, recognized that it had not clearly expressed such intent when, in 1959, it amended the involved sections of the Act to specifically cover loans and lending (Sec. 404 of the Labor Management Reporting and Disclosure Act of 1959). Such amendment was Congressional recognition that loans had not theretofore been covered. *United States v. Chase*, 135 U. S. 255, 262; *United States v. Curtis*, 107 U. S. 671, 676; *Fischer Flouring Mills Co. v. United States*, 270 F. (2) 27, 28 (CA 9, 1959)."

It is urged that the identical resoning is applicable to the issue raised here for by adding the language:

> "* * * or any person * * * who acts in the interest of any employer (to pay) * * *."

The Congress also recognized that such a situation was not proscribed by the original enactment.

The evidence is plain that the money herein involved was *prima facie* paid or lent by *Carter* to Felice. There is no evidence that Felice *knew* otherwise. To ground a conviction on the thesis that he should have suspected otherwise—(the Appellate Court uses the term "shady business") that he should have known that Carter was not in fact the source of the funds, amends the original act unconstitutionally to conform to the 1959 amendment. Truly the rationale indulged in by the Sixth Circuit, "Just why Carter would, from his own funds, give Felice $4,500.00 is difficult to understand," applies equally to all those circumstances now, *but not then*, proscribed by the amended act. For whenever a person "acting in the interest of an employer" makes a payment such reasoning would obtain.

IV. RECEPTION IN EVIDENCE OF THE FORM 870, OF THE FACT OF ITS EXECUTION, OF THE PAYMENT OF TAX PURSUANT THERETO AND ALL RELATED EVIDENCE WAS ERRONEOUS, IN CONFLICT WITH RULINGS OF OTHER APPELLATE COURTS, AND HIGHLY PREJUDICIAL, NOT MERELY CUMULATIVE, AND CORROBORATIVE.

The evidence in the record is plain that Felice consistently claimed that the transaction was a loan (135a). Nonetheless, the Government urged the $4,500.00 was taxable income to him (126a). Finally, on advice of his tax counsel, one Cozza, Felice agreed to execute a Waiver of Restrictions on Assessment and Collection of Deficiency Tax (Form 870) and paid the tax (296a, 297a, 302a). Felice did not easily accede but ultimately conceded to his attorney's recommendations (305a). This event occurred almost four years after the original transaction, (but prior to the institution of this proceedings).

Felice properly preserved his objections to all evidence in this respect (128a, 126a, 140a, 161a, 162a, 166a, 176a). The District Court admitted such evidence.

The District Court regarded such evidence as impressive demonstration of Felice's guilt saying in its findings:

> "The *next significant event* in connection with the Internal Revenue, investigation occurred in March, 1960, when Mr. Felice, while still maintaining that the transaction of counsel, *paid an income tax plus interest thereon, the computation of which was based on the $4,500.00 being considered income for the year 1956.*" (Emphasis Supplied, 446a).

While Petitioner complained on appeal in this respect the Court of Appeals failed to clearly rule stating only:

> "There may have been one or two places where defense objections should have been sustained, but

> our consideration thereof persuades us that no prejudice came to the defendants by such rulings. None of the evidence so admitted established any essential links to the proof of the crime involved; it was but cumulative and corroborative. We hold that no such rulings affected any substantial rights of the defendants. (Rule 52(a) F. R. Cr. P.)" (*Infra*, p. 70.)

One is unable to determine from this statement whether or not such evidence is ruled admissible. A plain ruling on this point was indicated. For if the Court of Appeals means "yes," it overrules the many cases referred to below on this point. If its ruling means "no," but that such admission was non-prejudicial but merely cumulative and corroborative, it is inconsistent with the opinion of the District Court (446a) and, in fact, the heavy weight given by the Court of Appeals itself to such evidence:

> "In 1959, when his 1956 tax return was under review, Felice advised Internal Revenue agents that the $4,500.00 received by him in 1956 was a loan obtained from Carter. In 1960, however, under advice of counsel, he consented to such tax deficiency. He testified that he argued the point with his attorney, but followed his advice in allowing its inclusion in his 1956 income." (*Infra*, p. 58.)

Further on, the Court of Appeals said:

> "While there was some disagreement between the witnesses on some details, the facts which we recite could be found to be true." (*Infra*, p. 61).

The importance of this evidence thus cannot be gainsaid.

In the leading case on this subject, *Clark v. United States*, 211 F. 2d 100 (C. A. 8), the Court held that the Form 870 should not have been received in evidence. It failed to reverse the decision in that case, interestingly

enough, on the grounds that (a) the other and overwhelming evidence in the record established the appellant's guilt and (b) the Court did not refer to the Form 870 in its findings of fact. From this it was concluded that there was nothing "to suggest that the Court in any way relied upon or attached any weight to the waivers as a factor in its convicting of the Appellant." Said the Court, at 105:

> "One other contention is entitled to notice and mention. It is argued that it was error for the Court to admit Exs. Nos. 6 and 7, which consisted of two 'Waiver of Restrictions on Assessment and Collection of Deficiency Tax' forms (Form 870, U. S. Treasury Department) which Appellant had executed and given the Revenue Agents during the course of their investigation, in accordance with Section 272 (d) of the Internal Revenue Code, 26 U. S. C. A. Sec. 272 (d). The signing of such a waiver by a taxpayer is without any effect to preclude him from maintaining a civil suit for refund of the taxes assessed by the Commissioner on the basis of it. Payson v. Commissioner, 2 Cir. 166 F. 2d 1008, 1009; Herver v. Jones, D. C. W. D. Okla., 103 F. Supp. 210, 214, affirmed 10 Cir. 198 F. 2d 544. Much less then is such a waiver entitled to have any effect to convict a taxpayer on a criminal charge of evasion. See also Annotation 11 A. L. R. 2d pages 903, 907, 912, 915."
>
> "The Exhibits therefore should not have been received in evidence as having legal probative quality. But Appellant is not entitled to a reversal for this error; the case is not one that was tried to a jury. *The evidence is overwhelmingly convincing of Appellant's guilt to anyone reading the record. The Court did not refer to the waivers in its detailed findings of fact. And there is nothing else in the proceedings to suggest that the Court in any way relied upon or attached weight to the waivers as a factor in its convicting of Appellant.*" (Emphasis supplied).

In no sense of the word is the signing of a Form 870 an admission or even an intimation of an admission. The sole effect of executing such a waiver is that interest stops running on the amount of the deficiency. The taxpayer is automatically allowed to contest the deficiency which has been found to be due.[1] *United States v. Price*, 361 U. S. 304; *Joyce v. Gentsch*, 141 F. 2d 891 (C. A. 6); *Monjar v. Higgins*, 39 F. Supp. 633 (D. C., S. D. N. Y.).

In the case of *Hargis v. Godwin*, 221 F. 2d 486, the Court referred to the ruling in the *Clark* case, *supra*, holding that the Form 870 is not admissible as having legal probative value. There, too, the Court did not find error because the Judge had made it plain to the jury that the execution of the Form 870 was merely the taxpayer's way of getting into Court.

Unlike the *Clark* case, the case at bar was tried before a judge without a jury. Patently it was error to receive the Form 870 into evidence here as well as in the *Clark* case. But unlike that case, where the evidence of the Appellant's guilt was overwhelming, the evidence against Felice in the instant case is hearsay, inferential, incompetent and of a nebulous character (as is discussed hereafter). Moreover, and to the crux of this matter, whereas there was no reference made by the trial court in the *Clark* case to Form 870 in its findings, in the instant case there was *significant* reference made and weight attached to the signing of the Form 870 by Felice in the District Court's opinion.

Clearly this prejudicial error swayed the judgment of the Court in convicting Felice. The Court of Appeals did not rectify this error.

The Government admits that, if the Form 870 were a "compromise," it would have been "incompetent evi-

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[1] See Jacob Mertens, Jr., *Law of Federal Income Taxation*, Vol. 9, Section 49.139.

dence" (434a), because "public policy states and the courts follow the rule that the courts encourage compromise," (434a). Then, Government counsel argued that, because Felice had paid what the Government had asked, it was not a compromise (247a, 248a). This argument is unsound. The closing out of the years involved and dropping of other questions raised are sufficient to present a clear picture of compromise. There was mutuality of accommodation, there was give and take, (other items in contention were dropped by the Government) which are the very essence of compromise. The same Government counsel who denied that there was compromise between Felice and the Internal Revenue Service, in his examination of Meister, as his own witness, used the words "proposed adjustments," (130a, 131a, 132a); "settlement;" (132a); "adjustment"; (135a); the result of which is a Form 870, which Revenue Agent Meister said "is the agreement we request the taxpayer to sign for any additional tax assessment," (141a).

Equally untenable is the argument that this evidence was not offered as establishing tax liability of Felice, but for the purpose of showing how "the controversy of whether the $4,500.00 item was a loan had been terminated," (Government's Brief, p. 50). Execution of a Form 870 does not terminate the controversy! Execution of that Form is not an admission or concession. It merely serves as a procedural device to enable the Commissioner to assess and collect the tax. The taxpayer retains full right to contest the issue in further proceedings in the District Court. If the execution of a Form 870 is not an admission that tax was payable in a fraud case in which the issue is whether tax is payable, how then can it be said to be an admission that tax was payable under any other indictment?

In the alternative (and demonstrating that its contention that Form 870 was admissible was made tongue-in-cheek) the *Government* contended that the admission of that form was not "significant" (433a) but "cumulative" (Government's Brief, p. 50). Hardly so! *The District Court's opinion clearly shows the overwhelming reliance of the trial court on this evidence as establishing Felice's guilt.*

It is difficult to reconcile the language of the District Court (that this evidence was significant) with that of the Appellate Court (inferentially finding that it was merely cumulative). It is contended that if the trier finds a fact to be significant, he regarded it as a significant link in the conviction. Such a link when dec ired by the finder of fact to have influenced his decision cannot be summarily glossed over.

At any rate, the position of the District Court and of the Court of Appeals apparently admitting such evidence is in conflict with the many cases cited above and makes a clear cut ruling and determination by this court on yet another important question of Federal law highly desirable here.

V. THE EVIDENCE IN THE CASE DOES NOT PERMIT A FINDING THAT THE PETITIONER WAS GUILTY OF A WILLFUL VIOLATION AS REQUIRED BY SECTION 302 OF THE TAFT HARTLEY ACT.

The requirement of Section 302 of the Act that a willful violation be present presents an important question of federal law which has not been fully, and should be, further settled by this Court, U. S. Sup. Ct. Rules Part V, Rule 19(b). Indictments under this section are becoming commonplace, and indeed a multiplication of the number of cases arising under this section may be antici-

pated. A case to case interpretation of the "willful" provision based upon the popularity of the Union or official involved or upon the general repute of his organization can only be fostered by a void in interpretation by this Court.

Various interpretations of the meaning of the word "willful" have been urged upon the various courts in the instant case. In fact, the government argued in its brief before the Sixth Circuit that *this Court has pronounced it to be a word of many meanings*, its construction often being influenced by its context—citing *Spiess v. United States*, 317 United States 492, pointing out that on occasion it is used to mean evil purpose or criminal intent, but on other occasions without such implication citing *United States v. Illinois Central RR Co.*, 303 U. S. 239-242. The government further placed heavy reliance on *United States v. Ryan*, 232 F. 2d 481 (cited by the Sixth Circuit together with *Schmeller v. United States*, 143 F. 2d 544 and *American Surety v. Sullivan*, 7 F. 2d 605, 606, in its decision on this point in the instant case).

However, this germane issue cannot be easily nor lightly dismissed. In view of the requirement of willfulness, it plainly is legally unjustifiable to construe the prohibition expressed in Section 302 as having been violated by Felice in the absence of proof that he was conscious or aware that the money he received from Carter came from Pilsener and/or City Products. The requisite proof must include evidence that he had knowledge and was *particeps criminis* in the machinations engaged in by Carter and his colleagues behind the scenes. In point of fact, however, the record here is barren of any direct or justifiably indirect evidence that Felice knew or voluntarily or intentionally "received and accepted" the money from anyone other than Carter as a personal transaction between them.

None of the elements constituting the offense charged

in the indictment herein were proved against Felice beyond a reasonable doubt. The inferences upon which the Government relies in its case against Felice are not reasonably or justifiably drawn from the circumstances that relate exclusively to the activities of his co-defendants—the court *without evidence* simply infers it.

In its opinion, the District Court simply makes the declarative statement (449a):

> "As to the further element in the second count of the indictment requiring the Government to prove that the $4,500.00 was accepted and received by John Felice willfully and knowingly, this essential element has been proved beyond a reasonable doubt."

This essential element of proof is, however, lacking in the evidence as it applies to Felice. Far from having been proven beyond a reasonable doubt, the record reveals that the conclusion of the court derives solely from surmise, suspicion or guesswork. To the contrary, there is evidence that Felice was not aware that Carter gave him money originating from Pilsener and/or City Products (he approached Carter as a friend in a personal capacity for the loan, not in his capacity as an employer representative); nor is it proven beyond a reasonable doubt that, when Carter offered to give him a loan, Felice understood Carter was acting other than as a friend. Carter categorically denied that Felice knew that the money for the loan came from either City Products and/or Pilsener:

> "Q. Did you ever tell Mr. Felice that this money come from City Products and/or Pilsener?"
>
> "A. No, sir." (385a.)
>
> "Q. Did Mr. Felice at any time indicate to you that he would bring pressure to bear on the company if it did not loan him this money?"
>
> "A. There was no indication of that, no. I am quite sure he didn't." (Cross examination 196a.)

Wharton, in his *Criminal Law and Procedure*,* says that "unlawfully, willfully and knowingly" are words that import guilty knowledge as well as evil intent or bad purpose citing *Dunbar v. United States*, 156 U. S. 185; *Rosen v. United States*, 161 U. S. 29.

The Court in the *Rosen* case, *supra*, expressed the impact of the phrase "unlawfully, knowingly and willfully" in the following language:

> "In the ordinary acceptation, the words "unlawfully, willfully and knowingly" when applied to an act or a thing done, import knowledge of the act or the thing so done, as well as an evil intent or a bad purpose in doing such a thing; and * * *, could not have been construed as applying to the mere depositing in the mail of a paper the contents of which at the time were wholly unknown to the person depositing it."

And *U. S. v. Schneiderman* (D. C. Cal.), 106 F. Supp. 906, 935:

> "The purpose of adding the word 'knowingly' to the statute defining the offense was to insure that no one would be convicted for an act done because of mistake or inadvertence or other incorrect reasoning." * * *
>
> "The word 'wilfully,' as used in the indictment, means a statement or declaration made or other act done with the specific intent to cause or bring about the overthrow of the Government of the United States by force or violence as speedily as circumstances will permit."

In other words, to satisfy the offense charged against Felice he must have accepted and received the $4,500.00 "knowingly," i.e. knew it came from an interdicted source, negating the idea of "mistake, inadvertence or incorrect

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* Vol. 4, Sec. 1774, p. 578.

reasoning concerning same"; "with the specific intent" to extract and appropriate himself $4,500.00 from the funds of Pilsener and/or City Products.

Since Section 302 denounces only the "willful" receiving and accepting of money or a thing of value, the "willful" doing of the Act is the very essence of the offense. This point is forcibly made by the court in *Hargrove v. United States*, 67 F. 2d 820:

> "The Court here fell into the error of not distinguishing between the elements of an offense, where the statute simply denounces the doing of an act as criminal and where it denounces as criminal only its willful doing. In the first class of cases, especially in those offenses mala prohibita, the law imputes the intent (cases cited). Had the prosecution here been under such a statute, the charge of the Court would have been unexceptionable. In the second class of cases, the specific wrongful intent, that is actual knowledge of the existence of the obligation and a wrongful intent to evade it, is of the essence (cases cited)."

The failure of the Government to establish "specific wrongful intent," i.e. "actual knowledge of the existence of the obligation and a wrongful intent to evade it" cuts to the very bone of the Government's case against Felice. It renders the Government's case against Felice insufficient as a matter of law.

U. S. v. Ryan, 350 U. S. 299, requires that defendant must receive payment or delivery of money (1) with knowledge that he was receiving payment or delivery of money, and (2) with knowledge that the person giving him the money was an employer.

The burden as to neither of these requirements has been met by the Government. The evidence shows that what Felice believed was that he was receiving a loan, not the payment or delivery of money.

Furthermore, *Ryan* requires that recipient know the "donor" was an employer. Even if under legalistic niceties Carter can be held to be an employer, there is not an iota of evidence of any knowledge on the part of Felice that Carter was acting as such in making the loan. Carter was also Felice's friend. Considered in this light is it so illogical that Carter made the note payable to himself? And is delay in repayment conclusive of intentional intent not to repay? To warrant an inference of "willful" violation, must nothing more than a violation be shown, and is the word willfulness mere surplusage?

Parenthetically, the Court of Appeals (App. A, p. 56) cites the facts of Felice's request for a loan, and Carter's request that Felice see him at his office in a few days. It then says:

> "We mention those details because they bear on Felice's claim, later discussed, that he did not know the source of the money he took. * * *"

Later in the Opinion (App. A, pp. 61-62) the Court relies on these facts as being heavily and plainly indicative of guilt. We fail to see how Carter's position as President of Pilsener gives rise to the inescapable thesis that Felice knew the money came from the Company and not Carter, simply because he was asked to come to Carter's office for the money. Such a haphazard approach to the "willful" requirement is not sanctioned by this or other courts.

United States v. Murdock, 290 U. S. 389 is the leading case on the subject of the import of the word "willfully." There Justice Roberts at pages 394, 395 made the following apposite remarks:

> "The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accident. But when used in a criminal statute it generally means an act done with bad purpose (cases

cited); without justifiable excuse (cases cited); stubbornly, obstinately, perversely (cases cited). The word is also employed to characterize a thing done without ground for believing it lawful (cases cited), or conduct marked by careless disregard whether or not one has the right so to act (cases cited)."

In a more recent case, *Korholz v. United States* (1959), 269 F. 2d 897 (C. A. 10), the Court had occasion to instruct the jury on the critical importance of the terms "willfully" and "knowingly" in the penal law:

> "* * *. Now the word 'knowingly' as used in the indictment, as used in these instructions means intentionally and with an awareness and conscionsness of what one is doing. Now, the word 'wilfully' as used in the statute * * * connotes an intentional violation of the law, and a defendant who actually does violate the provisions of law here involved would not be guilty of a criminal offense unless he is either conscious of the fact that what he is doing constitutes a violation of the law or unless he wholly disregards the law and pursues a course without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law or not."

A consideration of this issue and the determination of the meaning and full interpretation of an ever more important criminal statute, Section 302(d), is indicated.

VI. THE EVIDENCE DID NOT SUPPORT THE FINDING OF THE COURTS BELOW THAT THE PETITIONER RECEIVED "A GIFT OF MONEY OR OTHER THING OF VALUE" WITHIN THE MEANING OF SECTION 302(b) AS IT EXISTED PRIOR TO ITS AMENDMENT IN 1959.

A. The Court of Appeals properly decided that Section 302 did not proscribe a bona fide loan.

B. There is not sufficient evidence to support the finding that the receipt of the $4,500.00 by the petitioner from Carter on April 17, 1956, "beyond a reasonable doubt" was not a loan.

(1) Direct evidence that the transaction was a loan.

The Court of Appeals held that unless the trial court "could find, beyond a reasonable doubt," that the transaction was not a loan but an "outright payment," Felice must be acquitted.

The question of law before the Court of Appeals, as pointed out by the Court, was "a claim" asserted by "all" appellants "that *the evidence was not sufficient to support a finding of guilt.*" (Emphasis supplied.) This same issue is now raised before this Court by Felice. A brief review of the facts is here indicated insofar as they pertain to this contention.

All of the elements of a loan were present in this case: When Carter gave Felice the money, he required Felice to sign a note acknowledging his indebtedness to Carter for $4,500.00 (38a, 269a). There is not a scintilla of evidence or a basis for a fair inference that Felice in any way attempted to conceal or suppress the fact that he had borrowed the money. The note was a legally enforceable instrument which evidenced his obligation, and even that of his estate in the case of his death, to make repayment with interest. He acted directly, frankly, openly and without

subterfuge to make the loan. Every prosecution witness and every defense witness testified either (1) the transaction constituted in fact a loan, or (2) that such witness had been informed that the transaction was intended as a loan.

Nero, Pilsener's Comptroller, testified that Carter told him that he was making a loan to Felice (25a). The transaction was carried on the books of Pilsener as "a note receivable" (37a, 66a). All of the corporate records of Pilsener confirm that at all times this transaction was treated by Pilsener as a loan and "each year, during the course of the audits" of the Pilsener books, the auditors were informed that Felice "had secured a personal loan from Carter" (80a). The Internal Revenue Agent investigating Felice's income tax returns for 1954 through 1956, testified that Petitioner, and his attorney-accountant, Cozza, claimed the transaction in question was a loan (135a, 140a). Another Government witness, Gerald Stanton, partner in an independent accounting firm testified that Zeidler, a top executive officer of both Pilsener and City Products, told him the transaction was a loan (Gov Exh. 21). Zeidler himself testified that the transaction was intended solely as a loan and that he, as well as Pilsener and City Products, had so treated it (334a, *et seq.*).

Carter, in 1960, when questioned by F. B. I. agents, denied all knowledge of the transaction. Before the Grand Jury he explained this untruth by claiming he thought that a "personal loan or a company loan" was what "the name implies" and as such it was not "anybody's business" and that in speaking to the F. B. I. he was not under oath (188a). But before the Grand Jury "under oath" (188a) and before the trial court, he reasserted that the transaction was a loan (383a-385a). The District Court stated the "condition of the mind is rarely susceptible to direct

proof but it depends upon many factors. It may be inferred from outward acts. * * *" "He (Carter) further admitted that his statements in the interview concerning his lack of knowledge of and participation in the Felice transaction were false." (447a). Whatever Carter's motivations in denying the facts to the F. B. I., the denial cannot be regarded as evidence against Felice.

Nothing in the record either from Felice or Carter or anyone else remotely suggests that Felice regarded or intended this transaction to be anything other than a personal loan from Carter. Carter categorically denied that Felice knew that the money came from either City Products and/or Pilsener (385a). See also the testimony of Felice on this point (269a). Felice learned for the first time in July or August, 1960, some four years later, that the $4,500.00 had originated from Pilsener and/or City Products (269a, 270a, 271a).

In direct contradiction to the "abiding conviction, beyond a reasonable doubt" of the District Court, the Court of Appeals, in acquitting City Products, found that Zeidler, its treasurer, had no knowledge of any cover-up. See Point I *infra*. The Court of Appeals apparently, therefore, have found that City Products' *knowledge* was that of a bona fide loan but Pilsener regarded the transaction as a gift. This posture overlooks the true inter-relationship between City Products and Pilsener. It adopts a schizophrenic approach to Mr. Zeidler's mind.

Carter admitted that Felice asked him for a loan (190a), that he considered it a loan (185a, 187a) that the cognovit note signed by Felice was made payable to him (181a), that he obtained Felice's signature on the note (181a), that the writing on the note was his (181a), and that when Felice asked him for a loan he did not tell him he would check with the Company (191a).

Felice had a right to believe that someone in Carter's apparent financial situation could make such a loan. He had the right to believe that this was a personal loan from a friend, not a company loan, especially when he was asked by Carter to make the note to him. Obviously, Carter had the note made payable to himself because he understood that Felice expected a loan from him and not from the Company.

There is no evidence to support the assumption, especially in view of the above-mentioned direct evidence, that Felice's mention to Carter of a need for money, but without a request for a loan (proffered by Carter) was an extortive demand. Carter was his close friend (267a) and Felice had right to state his intended purchase and need of money. *N. L. R. B. v. Armour & Co.*, 154 F. 2d 570, 574. For suggestions concerning Carter's role in this transaction, see (409a, 410a).

If Felice believed he was borrowing the money, then to him the transaction must be considered a loan. If Felice borrowed $4,500.00 with the intent of making a loan, such transaction as to him is a loan notwithstanding Carter may have secretly intended a gift, i.e., not to collect the note. A holding to the contrary would obviously be unconstitutional for it would affix criminal liability on a person, notwithstanding his honesty and good faith for the secret criminal intent (mens rea) of another. The question as to whether one party to a transaction may be guilty of a violation of 302, while the corresponding party is innocent has been laid to rest. *Arroyo v. U. S.*, 359 U. S. 419, plainly says yes.

If Felice were attempting to enter into a sham transaction, would it not have been more logical for him not to give any written evidence at all, and especially not a collectible note? For text of note, see (385a). He must have

known that should he meet death as a result of a sudden and fatal accident, or any other cause, his estate would have to meet the obligation of the note.

(2) The record is devoid of probative evidence on which to base a conviction of Felice.

In the light of all the testimony and reasons set forth above, what evidence is there to justify the finding of the District Court (448a), and for the Court of Appeals to conclude that the "facts, plus justifiable inferences drawn therefrom, were * * * sufficient to justify the District Court's finding that * * * the alleged loan was in reality an outright payment to Felice * * *."

The Court of Appeals found that "There was *no direct evidence* that Felice knew that the money paid to him came from Pilsener and a finding of such knowledge had to rest upon circumstantial evidence." An examination of all circumstantial evidence would indicate that it was either hearsay as to Felice, or inadmissible or, *when considered with the plethora of direct evidence*, inadequate, to use the Court of Appeals' language, "to warrant a finding of guilt beyond a reasonable doubt."

The circumstances relied on are:

a. The bank's official check.

Carter gave Felice an official bank check. This was referred to by both the trial court (445a) and the Court of Appeals. Both courts intimated that this was a guilt-like act. We fail to see the point. Would the delivery of cash, or a check of Carter's or of either company, be more consonant with innocence. How do those courts suggest a bona fide loan would be made? It seems to us that the answer is that he who searches evil with the intent of finding it, will find evil wherever he looks. There is no evidence

or even an intimation that Felice had requested such a check. Culpable intent, if any, on the part of Carter, can not be imputed to Felice. *Arroyo v. U. S.*, 358 U. S. 419, 423, 424.

b. Place.

The place was also referred to by both the District Court (44a) and the Court of Appeals. It was Carter who asked Felice to come to his office to receive the money and give the note. Felice had nothing to do with the choice of place.

A borrower may go to his friend's office, without arriving at the conclusion that the loan is made not by his friend but by his friend's employer.

c. Carter's statement to Nero.

What Carter said to Nero when Felice was not present was hearsay as to Felice, and objected to by Felice on that ground (30a). The Court admitted this testimony "subject to subsequent" evidence to "connect it up."

Nero testified Felice "secured a personal loan from Mr. Carter." (80a); that he (Nero) had no personal contact with Felice (71a); that the "obvious cause for the instruction" by Carter to him to keep the loan "confidential" was that Carter "didn't want a lot of people to make loans if information like this got out." (83a). Notes for loans by City Products to employees likewise were treated as confidential. (85a).

d. Interest.

Evidence was introduced at the trial to show interest rates (99a) commercially were generally higher than the 3% rate on the note. Commercial interest, of course, is not necessarily what persons must charge their close

friends (267a). Legal interest in Ohio, being not more than 8%, it was not unnatural for Felice to say to his close friend, Carter, as to interest: "I told him that whatever interest he would charge, that I would take care of it." (291a). It would appear to be plain that if the note were a mere sham a higher rate in line with commercial transactions would have been inserted to avoid suspicion. Interest which is not going to be paid is the same (nothing) whether it be one percent or twenty percent.

e. Company policy as to loans.

Much is made of the testimony (180a, 185a) that it was company policy not to loan money to anybody as being semi-conclusive of the fact that the money was a gift to Felice. The over-simplification is apparent that it was likewise not the company policy to give money away (especially in violation of law!). Should this be considered as being semi-conclusive of the fact that the transaction was not a gift?

More seriously, notwithstanding the so-called announced policy of never making a loan, the fact is that loans had been made and the Felice loan fits into the category of loans, especially in view of the Court of Appeals' acquittal of City Products on the theory that its treasurer believed that the transaction in question was a loan. In short, despite the *haec verba* of the testimony, it is plain that the policy of the Company was not to make loans as a regular course of events, but that it did so occasionally. Again the observation must be made that even if the illusory policy of no loans—a policy more honored in the breach than in the keeping—was in fact Pilsener's policy, and this Court should find its breach has relevance and probity, such evidence has efficacy only against the other

defendants, and not against Felice. He certainly had no part in the making of the policy, in the decision to abrogate it (either in respect to the loan to himself or the others to whom loans were made) and he had no knowledge that the loan was being made from Company funds.

f. Lack of effort to collect note.

The District Court said:

> "From the time of the making of the note until the note was charged off the books of the defendant corporation, no effort was made to collect the note." (446a.)

In view of the Appellate Court's finding that Zeidler believed the transaction was a loan, this element of lack of effort to collect, is another discredited link in the chain that formed the basis of inference of guilt. How is it logical to construe this lack of effort to form a basis of inference against Felice, and not against City Products, the party who should have made the effort, if any was to be made.

Such lack of effort to collect does not make Felice's note any less bona fide or reflect any guilt on him. *Arroyo v. United States*, 358 U. S. 419, 423, 424. The task of collecting the note, which was carried on the corporate books of both corporations as a "note receivable" (48a, 446a) belonged not to Felice. (65a.)

g. Nonpayment of note.

The note has not been paid by Felice. However, Felice did make inquiry of Carter with respect to repayment. (293a.) While Carter did not recall the conversation, he did not deny that it had taken place. (386a, 386b.) The lack of effort to collect has been discussed under the previous heading. Not being pressed, Felice might have turned

his interest to other financial needs. Such attitude is not rare on the part of debtors.

The fact remains that this note is a good and valid obligation, enforceable against Felice and his estate, on which the statute of limitations (15 years) has a long time to run.

C. The total absence of probative testimony against Felice makes it plain that his conviction was based upon evidence erroneously admitted.

As demonstrated in the preceding section, the fact that the loan had not been repaid at the time of trial was the sole fact which in any wise could be construed as evidentiary against Felice. This is hardly sufficient! How then can his conviction be explained? It was grounded upon a web of erroneous and improper evidence adduced and admitted against him.

(1) The reception into evidence as against Felice of the charge-off by City Products of his note was prejudicial error. Even if the Court of Appeals' ruling had not taken this evidence out of the picture, it still would not be probative against Felice, coming late as it did and being unilateral action by City Products. Felice had a standing objection as to such records (23a), objected on the ground of materiality so far as he was concerned and on the further ground that it was "hearsay" as to him (58a to 64a), which was overruled (64a). Counsel for City Products conceded that the write-off was ordered by Zeidler, *almost four years after the transaction*, on March 31, 1960 (64a, 65a), without any complicity on Felice's part. What City Products did *almost four years after the transaction* was remote in time; it was not an act over which Felice had any control; and it wouldn't show Felice's intent on April 17, 1956.

Many bona fide loans are written off, especially after the lapse of years without this being a "significant" fact for concluding "beyond the shadow of a doubt" that the creditors *never* intended to be repaid or that the debtor did not intend repayment. The trial Court characterized this erroneously admitted evidence as *significant*. (The effect of the reversal of the Court of Appeals on the admissibility and significance of this testimony is separately discussed herein, Point I.)

(2) Numerous objections to evidence neither pertinent nor relevant as to Felice, were erroneously overruled. Such evidence must, therefore, be taken to have been considered by the Court (since the objections were overruled) in arriving at a conclusion of guilt so far as Felice is concerned.

The District Court said to counsel for Felice: "Unless an objection was being made for some other reason" than relevancy or pertinency, the Court would consider the objection as based on those grounds (21a; 22a). Objections as to irrelevant or immaterial evidence appear on pages 21a; 26a; 32a; 33a, hearsay; 34a, hearsay; 36a, hearsay; 38a; 40a, hearsay; 41a; 42a; 43a, hearsay and remote; 45a; 49a, remote; 56a; 58a; 60a; 61a; 62a, court did not even respond; 64a; 69a; 79a, hearsay; 90a; 101a; 103a; 112a, hearsay; 117a; 118a; 122a; 123a; 125a; 126a, hearsay; 128a; 130a; 136a, hearsay; 140a; 142a; 145a; 157a; 166a, hearsay; 170a; 176a, hearsay; 278a, hearsay; 280a; 283a; 284a; 286a; 287a; 298a; 299a; 307a; 311a; 323a, testimony allowed with comment that court did not know "what difference it would make"; 323a. *All were permitted.*

(3) Relatedly, all the *inter-office* "work" between Pilsener, Carter, and City Products were inadmissible as to Felice as hearsay. Felice properly objected to all those

corporate records as inadmissible against him (23a). The Court stated that it would consider that Felice had a general standing objection as to those records (23a). It then overruled the objection, stating that the introduction of the objected testimony "doesn't indicate that it has any application to him (Felice)." (23a.)

This general objection was extended "to all matters that were done by Pilsener" (25a). Yet, such corporate records, although hearsay as to Felice, were not excluded as to him, e.g., 23a; 25a; 38a; 40a; 41a; 42a, hearsay; 45a, 46a, also remote; 49a, also remote; 56a; 58a; 59a; 60a; 61a; 66a, the *only* instance in which the Court agreed that the records would not apply to Felice, only to arrive at a contrary decision on the next page 67a; 69a.

(4) The erroneous admission into evidence of the Waiver of Restrictions and of the payment of the tax on the $4,500.00 has been discussed above.

(5) Evidence of an illegal loan made by City Products in another isolated and totally unrelated instance, at another time, and in a remote place (New York State) in which none of the principals herein participated (117a), and in regard to which there isn't even a scintilla of evidence that Felice had any knowledge, was improperly admitted.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A.

OPINION OF THE UNITED STATES COURT OF APPEALS, FOR THE SIXTH CIRCUIT.

(Decided January 9, 1963.)

Before CECIL, Chief Judge, MILLER and O'SULLIVAN, Circuit Judges.

O'SULLIVAN, Circuit Judge. This matter involves the appeals of two corporations and two individuals from judgments of convicition for violating § 302(a) and (b) of the Taft-Hartley Act (Title 29, USCA, § 186(a) and (b)). These sections make it a crime, in industries affecting commerce, for an employer to pay any money to an official of a union representing its employees and for such union official to accept the money. (§ 186(a), (b), Title 29, USCA).[1] Exclusions from the Act's applicability are not relevant here.

Defendant-appellant Pilsener Brewing Company operated a brewery in Cleveland Ohio. It was a wholly-owned subsidiary of defendant-appellant City Products Corporation, whose main offices were in Chicago. Defendant-appellant George S. Carter was, at the time of the alleged offense, president and chief executive officer of Pilsener, as well as a member of its board of directors. He was also a vice-president of City Products. Defendant-appellant John J. Felice was, at the time involved, the president and general manager of Teamsters Union Local No. 293, which was the bargaining representative of some of Pilsener's employees. City Products and Pilsener were

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[1] (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

engaged in an industry affecting commerce. An indictment returned December 16, 1960, in its first count, charged that on April 17, 1956, City Products, Pilsener, and George S. Carter unlawfully, wilfully and knowingly paid $4,500.00 to defendant Felice and, in its second count, that Felice unlawfully, wilfully and knowingly received such money from City Products, Pilsener and George S. Carter, all in violation of the mentioned statute.

All defendants waived jury trial and the cause was tried to a United States District Judge sitting in Cleveland, Ohio. The District Judge found all defendants guilty as charged and imposed the following sentences: City Products and Pilsener were fined $10,000.00 and $4,500.00, respectively; George S. Carter was sentenced to 90 days in jail; and John J. Felice was sentenced to 90 days in jail and fined the sum of $4,500.00. The respective appellants assert varying grounds for reversal, but common to all is a claim that the evidence was not sufficient to support a finding of guilt.

The factual story of this case, which for the most part is undisputed, is as follows. For some years prior to April, 1956, Carter, as president of Pilsener and Felice as head of the Teamster Local, participated in the labor negotiations between Pilsener and the Teamsters Union. Each signed the resulting bargaining agreements in their respective capacities for Pilsener and Teamsters. While Carter and Felice described their relationship as that of intimate and social friends, their association and acquaintance had beginning in labor negotiations in which they had both participated. Sometime prior to April 17, 1956, Felice arranged to purchase two homes, one for himself and one for his son, who was vice-president of the Teamster local. The price to be paid for these houses was $79,000.00. Felice expected to finance such purchase by a mortgage

on the houses being purchased as well as a mortgage on the home then owned by him. In addition to the proceeds of such mortgages, Felice was required to put up some cash. Felice told Carter of his contemplated acquisition of the new homes and said that he would likely need some cash to close the purchase. As testified by Felice, Carter replied, "If you do, see me." Later Felice told Carter that he needed $4,500.00. Carter, according to Felice, replied, "Give me a few days. See me at the office." (Pilsener office) Carter's account of these preliminary talks was that in telling Carter of his planned purchase, Felice said that "he might need a few thousand dollars for a short period of time" and "I said 'all right' or something to that effect." Carter's further testimony was that when later he was told of the amount needed, he stated to Felice "All right. Will you give me a couple of days and I will see what I can do about it." We mention these details because they bear on Felice's claim, later discussed, that he did not know the source of the money he took, other than his claimed assumption that it came from Carter's personal funds.

Following the above talks, Carter, according to his testimony, called one William Zeidler at the Chicago office of City Products and told Zeidler that Felice wanted to borrow some money and asked whether "we should loan him the money." The next day, again as stated by Carter, Zeidler called him back and said, "Go ahead, make the loan." Zeidler, who was vice-president and treasurer of City Products, as well as secretary and director of Pilsener, denied approving the transaction as claimed by Carter. There was evidence that many transactions by Pilsener were cleared in advance with City Products.

On April 16, 1956, Carter advised the controller of Pilsener, one Nero, that Pilsener was making a loan to

Felice of $4,000.00. He advised Nero that a company check should not be used to transfer the funds, but that payment was to be made with an official bank check or in cash. Pursuant to such instructions, Nero issued Pilsener's check for $4,000.00 to Cleveland Trust Company and with it purchased a Cleveland Trust Company "official check" payable to the order of John Felice. On April 17, 1956, Nero delivered the above check and a blank promissory note to Carter who then advised that the amount should be $4,500.00. Five hundred dollars was withdrawn from petty cash and given to Carter. Later that day, Felice arrived at the Pilsener office and was given the $4,000.00 check and $500.00 in cash. He signed a promissory note, which had been prepared by Carter. The note was payable to Carter and called for repayment of $4,500 ninety days after date, with interest at the rate of three percent per annum. Felice said there was no discussion as to when he was to repay the loan or the interest to be charged. He only was aware of the amount of the note and that Carter's name was on it. He said, "Our understanding was that when I got it I would pay him," and that, "I told him that whatever interest he would charge, that I would take care of it."

In directing and completing the transaction, Carter told Pilsener's controller, Nero, that the transaction was to be kept "confidential" and that no attempt should be made to collect the note; that he, Carter, "would handle it." The note to Carter was not endorsed by him to Pilsener, but was delivered to its controller, retained by it and entered on the company's books under notes receivable. The $4,500 received by Felice was, as a part of the cash required, delivered to the bank at which his purchase of the two houses was completed. Although carried as a note receivable on the company's books and appearing as past due after its maturity, no effort was ever made to collect it and

in 1959 it was charged off. This was done by direction of the then officials of the Pilsener division of City Products, the Pilsener corporation having in June, 1956, been dissolved and its business thereafter carried on as the Pilsener Brewing Division of City Products. Notwithstanding such chargeoff, it was not claimed as a bad debt deduction on the income tax return of City Products. Pilsener Brewing Division of City Products will also be referred to herein as Pilsener.

Carter left the employ of Pilsener in 1958 and became associated with another brewery in Cleveland. Prior to his leaving Pilsener, and at the request of its auditors, Carter signed a paper reciting that although "not endorsed to the company for bona fide business reasons" the Felice note was the property of Pilsener. In 1959, when his 1956 tax return was under review, Felice advised Internal Revenue agents that the $4,500.00 received by him in 1956 was a loan obtained from Carter. In 1960, however, under advice of counsel, he consented to such amount being added to his 1956 income and paid the resulting tax deficiency. He testified that he argued the point with his attorney, but followed his advice in allowing its inclusion in his 1956 income.

In 1960, when first asked by FBI agents about the transaction of 1956, Carter denied giving or making a loan of $4,500.00 to Felice. As a witness before the Grand Jury, he recanted such denial and told of making the payment to Felice, claiming that it was a bona fide loan to Felice from Pilsener. Felice testified that he assumed that the claimed loan was made to him from Carter's own funds. Carter testified that he did not tell Felice that the money came from Pilsener and that Felice never made any inquiry as to its source. There was no direct evidence that Felice knew that the money paid to him came from Pilsener and a find-

ing of such knowledge had to rest upon circumstantial evidence. At no time in the intervening years between April, 1956, and 1960, did Felice do anything about paying the principal or the interest due on the money which he claimed he borrowed. There was no evidence that the interest payable on the note was ever reported as accrued income by Pilsener. Felice testified that on one occasion, the time and place of which he could not recall, he mentioned to Carter that he "would like to make some arrangement to pay back that money" and that Carter replied, "What are you worrying about? Have I asked you for it?" Carter could recollect no such conversation.

Aside from this last mentioned conversation, neither Carter, Felice, nor anyone connected with City Products or Pilsener gave any explanation as to why no effort to collect or offer to repay this alleged loan was ever made.

In the District Judge's opinion finding all defendants guilty, he found as a factual conclusion that the payment of $4,500.00 to Felice was not a loan, stating:

> "That the defendants from the very beginning of this transaction did not look upon or intend this transaction to be a loan; that Felice never intended to repay the money received or any interest thereon; and that the defendants did not expect to be repaid."

The District Judge expressed his further opinion that even if the transaction were assumed to be a loan "the transaction constituted the payment and receipt of a thing of value and a violation of Section 186, Title 29 USCA."

We will discuss such of the asserted grounds for reversal as we consider require discussion under the subject headings and in the order following:

1. *Would a bona fide loan violate the statute?* The government asserts that even if the involved transaction was, in truth, a loan, the statute was violated. We cannot

agree. The conduct proscribed by such statute (§ 302, Labor-Management Relations Act of 1947, § 186 USCA Title 29) is for an employer "*to pay or deliver, or agree to pay or deliver, any money or other thing of value*" to a representative of its employees' union and for such a union representative "*to receive or accept, or to agree to receive or accept, from the employer . . . any money or other thing of value.*" Were we here construing a statute relating to civil rights or remedies, it might be permissible to spend time considering whether, by construction, the word "loan" could be added to actual words employed. Such a meaning, however, does not emerge with the clarity which should be found in criminal statutes. *Winters v. New York*, 333 U. S. 507, 515, 92 L. Ed. 840, 849. We think it sufficient to refer to the language of Judge Martin, writing for this Court in *North American Van Lines v. United States*, 243 F. (2) 693, 696, 697 (CA 6, 1957). Citing decisions of the United States Supreme Court, we there said "Impossible standards of specificity are not required, but the language of the statute (charging a criminal offense) must convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." The statute here involved created a new offense not theretofore known to statute or common law. The coverage of such a statute may not be extended beyond what clearly appears from its explicit language. *Connally v. General Construction Co.*, 269 U. S. 385, 391; *McBoyle v. United States*, 283 U. S. 25, 27. We do not find, in the language employed, a Congressional intent to make a bona fide loan between parties described in the statute a crime. Congress, itself, recognized that it had not clearly expressed such intent when, in 1959, it amended the involved sections of the Act to specifically cover loans and lending (Sec. 505 of the Labor-Management Reporting and

Disclosure Act of 1959). Such amendment was Congressional recognition that loans had not theretofore been covered. *United States v. Chase*, 135 U. S. 255, 262; *United States v. Curtis*, 107 U. S. 671, 676; *Fischer Flouring Mills Co. v. United States*, 270 F. (2) 27, 28 (CA 9, 1959).

Unless there was evidence from which the trier of the facts, the District Judge, could find, beyond a reasonable doubt, that the clothing of the alleged loan was a sham to hide an outright payment, the convictions must be set aside.

2. *Was the alleged loan, in true fact, an outright payment?* We have, in some detail, recited the facts disclosed by the evidence because we believe such recital provides the answer to the question raised. Proof of criminal conduct may be made out by circumstantial evidence. *United States v. Comer*, 288 F. (2) 174, 175 (CA 6, 1961); *Holland v. United States*, 348 U. S. 121, 139-140. While the circumstantial proof, with the inferences drawn therefrom, must be sufficient to warrant a finding of guilt beyond a reasonable doubt, such proof need not, as claimed by appellant, be such as to exclude every reasonable hypothesis other than that of guilt. *Holland v. United States, supra*, p. 139; *United States v. Thomas*, 303 F. (2) 561, 562, 563. In determining whether the evidence was sufficient to withstand a motion for acquittal, the evidence must be viewed in the light most favorable to the prosecution. This rule applies to a case tried to a District Judge, as well as a case tried to a jury. *Battjes v. United States*, 172 F. (2) 1, 5 (CA 6, 1949).

While there was some disagreement between the witnesses on some details, the facts which we recite could be found to be true. These facts, plus justifiable inferences drawn therefrom, were, in our opinion, sufficient to justify the District Judge's finding that, as a matter of fact and

beyond a reasonable doubt, the alleged loan was in reality an outright payment to Felice, known and intended to be such by the defendants Pilsener Brewing Co., Carter and Felice. This was so at the close of the government's case, as well as at the close of proofs. The motions for acquittal, made at these times by defendants Carter, Felice and Pilsener Brewing Company, on the ground that the government's proof was insufficient to permit a finding that the payment to Felice was not a loan, were properly denied. We exclude defendant City Products from our holding in this regard because, for reasons later discussed, we find it necessary to reverse the conviction of that corporation.

3. *Guilt of City Products Corporation.* City Products owned all of the stock of its subsidiary, Pilsener Brewing Company. It had no employees, however, who were members of Teamsters Local 239. The indictment, in effect, charged that on or about April 17, 1956, City Products, an *employer of employees*, paid the sum of $4,500.00 to a union representative of *"the aforesaid employees."* No such case was proved against City Products. City Products had no employees who could be said to be "the aforesaid employees" described in the indictment. City Products acquired the assets of Pilsener Brewing at the time the latter was merged with the parent. Such acquisition would not make it chargeable, as a principal, for a crime previously committed by Pilsener or Carter. Neither does the conduct of City Products subsequent to April 17, 1956, in failing to press for repayment of the spurious loan made to Felice, or its act in charging off the Felice note, render it guilty of the charged offense. Whether such conduct would render City Products guilty of being an accessory after the fact to Carter, Felice and Pilsener, is not before us. No such charge under Section 3, Title 18, USCA, was

made in the indictment. The government urges, however, that we should hold that City Products was an employer of Pilsener's union member employees, citing our decision in *NLRB v. Swift & Co.*, 127 F. (2) 30 (CA 6, 1942) and other cases involving the enforcement of various provisions of the National Labor Relations Act. We find none of these cases apposite here.

It is further argued that because of testimony by Carter that he got the permission of Zeidler, secretary of City Products, to make the alleged loan to Felice and because the District Judge, despite Zeidler's denial, found as a fact that Carter "was authorized and directed by William Zeidler, a proper official of the City Products, to engage *in the transaction* here in dispute, prior to the delivery of the money to Felice," City Products is guilty as a principal. It is clear, however, that the only evidence of Zeidler's participation in the events occurring prior to and at the time of the alleged offense was his consent to Pilsener Brewing Company making a *loan* to Felice. We have held that a bona fide loan to a union representative was not proscribed by the statute, as it read in 1956. We do not believe the evidence would justify an inference that Zeidler, at the time he gave his consent, knew that such loan was but a cover for an illegal payment to Felice.

City Products' motions for acquittal should have been granted. This disposition of City Products' appeal makes it unnecessary to discuss other errors assigned by it.

4. *Criminal responsibility of the corporation, Pilsener Brewing Company.* The indictment was brought under Section 186(d), Title 29, USCA, which provides that "any person who *wilfully* violates any of the provisions of this Section, etc., . . ." shall be guilty of a crime. Defendant Pilsener urges that under the facts of this case it, a cor-

poration, cannot be held criminally responsible for the single criminal act of its president, George S. Carter. We will not here enter into extended discussion of the interesting subject of criminal responsibility of corporations. While concise and dogmatic rules cannot be distilled from the decisions, the uncertainties that long attended this subject have been cleared away to the extent that in this day we know that a corporation, through the conduct of its agents and employees, may be convicted of a crime, including a crime involving knowledge and wilfulness. *New York Central & Hudson River Railroad Company v. United States*, 212 U. S. 481, 53 L. Ed. 613; *United States v. Union Supply Company*, 215 U. S. 50, 55, 54 L. Ed. 87; *United States v. Ill. Central R. Co.*, 303 U. S. 239, 244, 82 L. Ed. 773; *United States v. Nearing, et al.*, 252 Fed. 223, 231 (S. D. N. Y., 1918); *Continental Baking Company v. United States*, 281 F. (2) 137, 149, 150, 151 (CA 6, 1960); 10 Fletcher Cyc. Corporations, § 4944, p. 873 (1961 Edition). It is essential, however, to corporate guilt, that its officer's or agent's illegal conduct be related to and done within the course of his employment and have some connection with the furtherance of the business of such corporation. Writing for this court in *Continental Baking Company v. United States, supra*, Judge Weick said:

> "This question of corporate responsibility for the acts of an agent is a most troublesome one. It involves issues of 'authority' and 'acts within the scope of employment.' The language of the decided cases varies in many instances and seemingly different theories of corporate responsibilities can be rationalized. However, when the decisions are viewed as an entirety, a common denominator appears.
>
> "There is an officer or agent with broad express authority, generally holding a position of some responsibility, who performs a criminal act related to the cor-

porate principal's business. Under such circumstances, the courts have held that so long as the criminal act is directly related to the performance of the duties which the officer or agent has the broad authority to perform, the corporate principal is liable for the criminal act also and must be deemed to have 'authorized' the criminal act." (citing cases) 281 F. (2) 149.

In the case at bar, we believe that the authority of George S. Carter and activity in which he was engaged at the time of the offense involved, brought criminal responsibility to the corporation of which he was president. As president, he was Pilsener's chief executive officer with the general supervisory authority that attends such office. Aside from his implied authority as president, he was, in fact, the one who ran the company. He was described by the company's controller as the one who issued the orders and directions and was "the sole official boss of the Pilsener Brewing Company." While Pilsener's labor negotiations were carried on through a brewer's association, Carter participated in such negotiations and customarily signed collective bargaining agreements with the Teamsters union for Pilsener. It is apparent that his association with Felice grew out of such labor negotiations. In today's economy, it is a large and important part of the business of any employer to carry on negotiations with a union representing its employees. We think that it can be fairly inferred that in acceding to Felice's request for money and providing such money out of the corporation's funds, Carter, however illegal and misguided his actions were, did so in the course of his employment with, and in furtherance of the business interests of, his company. *Egan v. United States*, 137 F. (2) 369, 380 (CA 8, 1943); *Mininsohn v. United States*, 101 F. (2) 477, 478 (CA 3,

1939). Proof of an actual benefit to the corporation in such circumstances is not essential to its responsibility. *Old Monastery Co. v. United States*, 147 F. (2) 905, 908 (CA 4, 1945); cert. denied, 326 U. S. 734, 90 L. Ed. 437; *United States v. Empire Packing Co.*, 174 F. (2) 16, 20 (CA 7, 1949). In the recent case of *Standard Oil Company of Texas v. United States*, 307 F. (2) 120 (CA 5, 1962) a corporate defendant's conviction was reversed because there the illegal conduct of its agents was shown to be solely for the personal gain of such agents, directly contrary to the interests of their corporate employees. Such is not the case before us.

We are of the opinion, too, that Carter's knowledge and wilfulness must be charged to Pilsener. The corporate person can only act and know through its officers, and the guilty knowledge and wilful conduct of its chief executive officer will be charged to the corporate person. *United States v. Armour & Co.*, 168 F. (2) 342, 344 (CA 3, 1948); *United States v. George F. Fish, Inc.*, 154 F. (2) 798, 801 (CA 2, 1946); *CIT Corporation v. United States*, 150 F. (2) 85, 89, 90 (CA 9, 1945); *Zito v. United States*, 64 F. (2) 772, 775 (CA 7, 1933). In *Magnolia Motor & Logging Company v. United States*, 264 F. (2) 950, 953 (CA 9, 1959), the wilful and knowing criminal act of a corporation's president was held imputable to the corporation.

We have considered the authorities relied upon by appellant Pilsener and are of the opinion that they are neither apposite nor controlling.

5. *Was there a wilful violation of the statute?* Under Subsection (d) of § 302 of the Act (§ 186(d) USCA Title 29) wilfulness is a necessary ingredient of the crime charged. Felice said that he knew that the Taft-Hartley Act forbade his acceptance of money from an employer

whose employees were members of the union of which he was president. Claiming that what he did was but a borrowing, he disclaims wilfulness. The District Judge found that what was done was not a loan, but was an outright payment and so understood. Felice knew what he was doing and so his wilfulness is apparent. Carter disclaimed any knowledge of the relevant proscription of the Act in question. We do not think it necessary to a finding of wilfulness that it be shown that the one so charged had read the statute which makes his conduct illegal. As stated by Judge Learned Hand in *American Surety Co. v. Sullivan*, 7 F. (2) 605, 606 (CA 2, 1925) "The word 'wilful' even in criminal statutes, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law." Such language was quoted with approval by Judge Allen of this Court in *Schmeller v. United States*, 143 F. (2) 544, 553 (CA 6, 1944). In *United States v. Ryan*, 232 F. (2) 481 the Second Circuit was considering, on remand from the United States Supreme Court, (350 U. S. 299) the meaning of "wilfulness" as that word is used in the specific statute here involved (§ 186(d) USCA, Title 29). A payment by a corporate officer to the president of a union, of which the corporation employees were members, was involved. The court upheld the conviction of the union official by a District Judge who had, on the question of wilfulness, said, "In my opinion, a wilful violation of Section 186(a) is proved if it is shown that a 'representative of any employees who are employed in an industry affecting commerce' received or accepted money from the employer of such employees with knowledge (1) that he was receiving or accepting money, and (2) that the person who was giving him the money was an employer of employees that he represented." *United States v. Ryan*, 128 F. Supp. 128, 133 (S. D. N. Y., 1955).

Felice argues that he did not know that the money came from Pilsener and therefore he did not wilfully receive it from an employer of members of his union. Aside from the fact that he knew Carter, as its president, was the agent of Pilsener, (§ 2 of the Act provides that the term "employer" includes any person acting as an agent of the employer), we are satisfied that the District Judge, as trier of the facts, could find from the evidence that Felice knew from whence came his money. When he asked Carter for it, Carter replied, "Give me a few days, see me at the office." It was at the Pilsener office that Felice received the bank check (which obscured the source of the money) and the cash. Just why Carter would, from his own funds, give Felice $4,500 is difficult to understand. The District Judge could find that Felice knew what was going on. Any viewer of the conduct of Carter and Felice would, indeed, be on plausible grounds in believing that both of them knew that they were "about some shady business" in this transaction.

We have stated above that the wilfulness of Carter is properly imputable to the Pilsener corporation and, therefore, hold that there was sufficient evidence from which wilfulness of the corporation could be found.

6. *Did the District Judge err in denying Carter a separate trial?* Carter's motion for a separate trial was denied. He claims to have been prejudiced thereby. The granting or denial of such a motion, made pursuant to Rule 14, F. R. Cr. P. is within the discretion of the District Judge. In the absence of an affirmative showing of abuse of such discretion, a refusal of severance is not assignable as error. *Stilson v. United States*, 250 U. S. 583, 63 L. Ed. 1154; *Bulloch v. United States*, 265 F. (2) 683, 689 (CA 6, 1959). We find no abuse of discretion in this regard.

7. *Constitutionality of § 302(a) of the Act.* Defendant Felice now asserts that subsection (a) of § 302 (§ 186

(a) USCA Title 29) is unconstitutional. We are not sure that we fully understand the basis of such claim. His brief on this point says:

> "The Congressional intention of Sections 302(a) and 302(b), prior to the 1959 amendment, was clearly to prohibit payments by an employer to a union representative. It was not intended that the prohibition reach sources other than the employer."

Such statement does not expose any constitutional infirmity, but rather confirms that the statute makes clear the conduct interdicted thereby. We read Felice's argument which follows the above quoted statement as a contention that the statute's constitutional infirmity is its alleged failure to adequately make known what persons would be considered agents or representatives of an employer. We find no such vice in the statute. In today's industry, the majority of employers engaged in commerce are corporations who can act only through individuals who are their agents. Section 2 of the Act (§ 152 USCA Title 29) provides that "the term 'employer' includes any person acting as an agent of an employer, directly or indirectly." It appears to us that a union representative would have little difficulty in recognizing the president of a corporation, whose employees are members of his union, as the corporation's agent. In *Ryan v. United States*, 350 U. S. 299, the Supreme Court held that the president of a union came within the term "representative of any employees." We think that, conversely, the president and labor negotiator of a corporate employer would easily be known to a union representative as one from whom he should not accept the forbidden payment of money. Upon the remand to it of the *Ryan* case, the Second Circuit held that the statute here involved was not so vague in its identification of a representative of employees as to be un-

constitutional. *United States v. Ryan*, 232 U. S. 481, 482, 483 (CA 2, 1956). The statute is not unconstitutional.

8. *The District Judge's ruling on evidence.* We have considered errors claimed to have been made by the District Judge in admitting some evidence and exhibits offered by the government. For the most part, the admission of such evidence was within the discretion of the District Judge. There may have been one or two places where defense objections should have been sustained, but our consideration thereof persuades us that no prejudice came to the defendants by such rulings. None of the evidence so admitted established any essential links to the proof of the crime involved; it was but cumulative and corroborative. We hold that no such rulings affected any substantial rights of the defendants. (Rule 52(a) F. R. Cr. P.)

Complaint is further made that during the presentation of the government's case the District Judge reserved his rulings on various objections made by defense counsel. A typical instance of such situation was where a ruling was reserved as to whether evidence received would be admitted as to all defendants, or only one of them. At the close of the government's case, the District Judge was asked to make rulings on such objections. He did not do so. On this appeal, however, counsel do not point to any instance where such failure to rule prejudiced any defendant. We have held that there was sufficient admissible evidence to sustain the convictions which we affirm. We find no reversible error in the District Judge's rulings, or failure to rule, on evidentiary matters. This disposition of appellants' complaint in the above regard does not indicate our approval of a trial judge's practice of repeated postponing of decisions on evidentiary matters by reserving a ruling thereon. (Not the situation here.) The burden of trial counsel should not be made heavier by such

practice. Counsel should, with reasonable promptness, be informed by the judge's ruling as to what further proof may be needed to sustain his case; where he represents a defendant he should not be required to go forward with his own proofs or attack the sufficiency of his opponent's case until he knows just what case his opponent has made. There may arise exigencies providing exceptions to the foregoing, but it is a good general rule to be followed in jury and non-jury cases (see discussion Vol. 1, Wigmore § 19, p. 348).

9. *Enforcement of judgment against Pilsener.* We do not think any problem of enforcement of the fine against Pilsener is presented by the fact that its indictment, conviction and sentence came after it had been merged into its parent, City Products. Both City Products and Pilsener were Ohio corporations. By virtue of § 1701.88, Page's Ohio Revised Code, Supp., and the holding of the United States Supreme Court in *Melrose Distillers v. United States*, 359 U. S. 271, a method of enforcing the sentence against Pilsener may be found.

The judgments against Pilsener Brewing Company, George S. Carter and John J. Felice are affirmed; the judgment of conviction of City Products Corporation is reversed with direction to enter a judgment of acquittal.

APPENDIX B.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed January 9, 1963.)

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

APPENDIX C.

ORDER OVERRULING PETITION FOR REHEARING.

Before CECIL, Chief Judge, MILLER and O'SULLIVAN, Circuit Judges.

THIS CAUSE having come on to be heard on a petition for rehearing, filed on behalf of the defendant John J. Felice, and the Court having read the same and upon due consideration thereof,

IT IS ORDERED that said petition be, and it is, hereby denied.

Approved for entry,

CLIFFORD O'SULLIVAN,

United States Circuit Judge.

APPENDIX D.

TRANSCRIPT OF PROCEEDINGS BEFORE THE HON. GIRARD E. KALBFLEISCH, JUDGE OF SAID COURT, ON FRIDAY, FEBRUARY 8, 1963, ON DEFENDANT CARTER'S MOTION IN MITIGATION OF SENTENCE.

APPEARANCES:

On behalf of the Government:

MERLE MCCURDY, ESQ.,

United States Attorney.

On behalf of the Defendant:

EDWIN KNACHEL, ESQ.

The Court: The Court has before it a Motion in Mitigation of Sentence or for Probation pursuant to Rule 35 of the Rules of Criminal Procedure, this motion having been filed by Mr. Knachel on behalf of George S. Carter. I have a note appended to this by the Clerk to the effect that the mandate of the Court of Appeals to its recent decision of January 9th has been received by the Clerk, which would form the appropriate basis for this motion.

Now, the Court had received the decision of the Court of Appeals in the slip sheet copy that is provided to the District Judges shortly, if not almost immediately, following decisions, and I have read it quite thoroughly. I doubt the need for any extended remarks, but that's the reason I mention it.

However, this is a most important matter, particularly, of course, to Mr. Carter, but to the Government as well. Preliminary to this hearing I had talked with Mr. McCurdy and Mr. McCurdy has made some inquiry regarding the Government's attitude and position, and I

would like to hear that briefly, Mr. McCurdy, before I go into the matter with Mr. Knachel.

Mr. McCurdy: Yes, your Honor. I talked with members of the Justice Department after receiving a copy of Mr. Knachel's motion in mitigation, in order to ascertain several things. Number one, whether or not they intended to take proceedings against the City Products Company, and they said they did not contemplate any further proceedings. Number two, that being true, I wanted to know what their attitude was toward Mr. Carter, inasmuch as the City Products Company had been granted reversal and final judgment, and the Department said that since that occurrence their attitude now is that they don't have any feeling one way or another as to Mr. Carter and they would not oppose in any manner whatever the Court saw fit to do.

The Court: That's on this motion to mitigate?

Mr. McCurdy: That's on this motion to mitigate; yes, sir.

The Court: Now, briefly, Mr. Knachel, what is it you would like to say to the Court on this motion?

Mr. Knachel: Well, your Honor, I have set forth and attached to my motion my personal affidavit and an affidavit from Mr. Carter.

The Court: I read those.

Mr. Knachel: Which I believe expresses my position in this matter, and since the ruling of the United States Court of Appeals, as I read their position, that the act of Carter was within the scope of his employment and a corporate matter, and the Corporation, the City Products, is not now in this case.

Now, your Honor, I know Mr. Carter personally, he is a personal friend of mine, and I know his family. I

say to your Honor that I have faith in him, and I believe if he were granted probation or was fined, that his conduct in the future would be exemplary.

The Court: Well, as you may have suspected from my remarks at the opening, the decision of the Court of Appeals—my reaction to it is not necessarily difficult to describe, but it seemed to me at the time and does now that in view of the findings of fact which I made at the time of the decision in this court, and particularly in view of the findings of fact which I made at that time which implicated Mr. Zeidler who, in my opinion, was as close to the modus operandi in this case as anyone—in fact, as you say, Mr. Knachel, were it not for Mr. Zeidler and his not only first approving but his confirmation on the telephone to pay Felice the money, that Carter this moment wouldn't have been in court. And most important, in my judgment—now it can be that I am blinded to some facet of this case, but no one has shown me why, how, where, if at all, I failed to see what I should see. So I say, though someone may later say, "Well, you must have been blinded on this," I think I have given this matter thorough and painstaking consideration, and not only from the standpoint that I considered at the time of the trial Zeidler's action in approving the payment of the money, but more particularly that the essence of the events was when City Products wrote this $4,500 off its books, at which time Carter wasn't even with the City Products.

Now, if the Court of Appeals, as they have, discharges the City Products Corporation from culpability in this crime, I feel that it would be a serious injustice to impose a sentence on Mr. Carter. I believe that if Washington has expressed itself as it has to Mr. McCurdy that we too certainly are obligated to recognize this turn of events.

If City Products are dropped from this case, this Court feels most certainly that it should sustain this motion.

I am consequently setting aside the sentence which was imposed under Rule 35. I am imposing a sentence at this time on Mr. Carter that he pay a fine of $1,500, and at this time I should like to call upon Mr. Carter and ask him whether he has any remarks he cares to offer. Usually we ask the defendant if he has anything to say before the pronouncement of sentence, and in order to avoid any technical possible question I would inquire of Mr. Carter if you have anything you care to say to the Court before this sentence is pronounced?

Defendant Carter: Only this, your Honor. I would like to thank you for the kind consideration you have given here today to this problem, particularly on behalf of my family, and I think the sentence and the fine is very considerate.

The Court: I have indicated in these statements what I proposed to do. However, your right to have something to say is not bound by these comments, and I will hear you on any matter at all, other than the indication I made. In other words, your right to object here now would not be in respect of the announcement that that's what I feel like doing. In other words, I'm only indicating to you the way I feel I am going to do, and your comments are not limited by my statements.

Defendant Carter: I don't feel I can add anything to those comments. This has been a very expensive experience to me and very embarrassing to my family and myself. It has prevented me from finding employment, and I think if the jail sentence is eliminated, why, I can find employment.

The Court: I will say this, Mr. Carter, after receiving this motion I had very little difficulty in coming to a de-

cision on the proposition as to whether you should be obligated under these circumstances to serve some time. I will say to you, too, that had the Court of Appeals sustained this Court in its view, in its finding against City Products, nothing would have disturbed the Court's decision that I imposed earlier. But I think in keeping with honest justice this Court cannot impose a sentence of imprisonment on you in view of the fact that City Products is to go scot free. It's just that simple, because certainly in my judgment without a doubt your implication in this was solely because of your capacity with that Corporation.

Now, I have reviewed the pre-sentence report that I received at the time sentence was originally imposed, with a view to determining how much of a fine should be imposed. I made up my mind to eliminate entirely the question of imprisonment which, in my judgment, disposes of the need for probation. But I feel that a fine is appropriate here in view of your implication with this transaction. I don't feel you are entitled to get out of this matter without having some penalty to pay, and in my judgment, considering your position and your worth as it is reflected in this pre-sentence report, $1,500 is an appropriate fine, and I will grant you a reasonable time within which to make this payment. You suggest to Mr. Knachel how much time you want to have. If you want that time I will be willing to give that to you.

Mr. Knachel: Ten days, your Honor.

The Court: I will grant you 10 days to pay the fine.

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Miscellaneous:

F.R. Crim. P., Rule 35 4

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 955

JOHN J. FELICE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 466-480; Pet. App. 54-71)[1] is reported at 311 F. 2d 934. The opinion of the district court (R. 443-449) is not reported.

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[1] The certified copy of the appendix prepared for the court below and supplemented with the proceedings in the Court of Appeals is designated "R". The separate volume of government trial exhibits is designated "Govt. Ex."

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1963 (R. 465). A petition for rehearing was denied on February 12, 1963 (R. 488). On March 8, 1963, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including March 29, 1963. The petition was filed on March 28, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the reversal of the conviction of one of two employer co-defendants for paying money to a representative of employees on the ground that it was not an "employer" within the meaning of the Taft-Hartley Act required a new trial as to petitioner, who was convicted of receiving money while acting as a representative of employees.

2. Whether the evidence supports the verdict.

3. Whether various rulings on the evidence were improper.

STATUTE INVOLVED

The Labor Management Relations Act, 1947, 61 Stat. 136, popularly known as the Taft-Hartley Act, provided in pertinent part:

Sec. 2. When used in this Act—

* * * *

(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, * * *

* * * * *

Sec. 302. (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

* * * * *

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

* * * *

STATEMENT

In a non-jury trial[2] in the District Court for the Northern District of Ohio, petitioner was convicted of having received money from an employer while a representative of his employees, in violation of Section 302 of the Labor Management Relations Act (R. 2-5; 443-449). He was sentenced to imprisonment for ninety days and fined $4,500 (R. 457). His conviction was affirmed on appeal. The court of

[2] Petitioner waived trial by jury.

appeals also affirmed the conviction of Pilsener Brewing Company and its president, George S. Carter, for paying the money.[3] City Products Corporation, of which Pilsener was a wholly owned subsidiary (and with which Pilsener merged after April, 1956), had also been convicted of making the payment but the court of appeals reversed as to it on the ground that, at the time of the pertinent transaction, April 17, 1956, City Products had no employees (R. 19, 473).

The evidence showed that petitioner was the president and business manager of Local 293 and represented certain employees of Pilsener Brewing Company (R. 14), of which George S. Carter, was president. Carter had negotiated a number of labor contracts with petitioner (R. 16, 178). On April 17, 1956, at the Pilsener office, Carter gave petitioner $4,500, a $4,000 check of the Cleveland Trust Company and $500 in cash (R. 269; Govt. Ex. 4, p. 31). Petitioner signed a ninety day promissory note at 3% interest payable to Carter (R. 269; Govt. Ex. 6, p. 36). Petitioner used the funds in connection with the purchase of two homes for $79,000 (R. 93-97).

The $4,000 check was obtained by Harold A. Nero, Controller of Pilsener, with a Pilsener Brewing Company check. Carter had told Nero he was going to lend Felice $4,000 and did not wish to give Felice

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[3] Subsequent to the affirmance by the court of appeals, co-defendant Carter made a motion in the district court for reduction of sentence under Rule 35, F. R. Crim. P., and his sentence was reduced from ninety days in jail (R. 456) to a fine of $1,500 (Pet. App. 78).

a Pilsener Brewing Company check (R. 25-26, 32). The $500 in cash was obtained out of "petty cash" (R. 33). Carter told Nero to keep the transaction confidential (R. 31).

By a closing entry on March 31, 1960, the $4,500 was charged off by the Pilsener division of City Products to a bad debt reserve (R. 53, 64-65). No efforts were made to collect the sum (R. 39, 71, 353, 385). Although written off on the books, the company did not claim a bad debt deduction for tax purposes (R. 359, 374).

Petitioner, in 1960, adjusted his 1956 tax return and paid income tax on the $4,500 (R. 121-142, Gov't. Ex. 23, p. 94).

At the trial, petitioner claimed that the $4,500 was a loan from his friend Carter (R. 267, 273-274), and that he did not know the funds came from Pilsener (R. 269; cf. 385).

ARGUMENT

1. Petitioner's claim that the reversal of the conviction as to City Products requires a reversal as to him (Pet. 12-16) is without merit. The ruling of the court of appeals with respect to City Products is sustainable on the sole ground that it had no employees represented by petitioner and hence was not an "employer" under the statute (Pet. App. 62-63). Obviously, this holding does not affect petitioner's guilt of illegally receiving money from Carter, who, as the agent of Pilsener, was an employer under the

statute, and whose conviction as an employer was upheld by the court of appeals.

The court of appeals, it is true, went on to hold that the evidence of Zeidler's approval of the transaction for City Products and that corporation's subsequent write-off of the advance as a bad debt was not sufficient to "justify an inference that Zeidler, at the time he gave his consent, knew that such loan was but a cover for an illegal payment to Felice" (Pet. App. 63). But, as the court of appeals itself concluded (declining to reverse the convictions of Pilsener, Carter and petitioner), it does not follow that Carter intended merely a loan; much less that petitioner viewed the payment as a loan, rather than a gift. And, of course, it is his own intention which is controlling as to petitioner's guilt. See *Arroyo* v. *United States*, 359 U.S. 419, 423-424.

2. As the court of appeals held, the evidence amply supports the conviction. It is unnecessary to reach the question whether the statute, before its 1959 amendment, applied to a loan (see Pet. 42-52). The district judge found that petitioner "never intended to repay the money received or any interest thereon" (R. 448). This conclusion is supported by petitioner's actions. He never made any payments of interest or principal on the money. When the transaction was discovered by Internal Revenue agents, petitioner paid income tax on the whole amount. Accordingly, there was sufficient evidence to support the conviction under the original statute for receipt of money from an employer.

Equally without merit is the contention that the element of willfulness was not established because the evidence did not affirmatively show that petitioner knew the money was coming from Pilsener, rather than from Carter as a personal loan (Pet. 35-41). All the circumstances of the case justify the conclusion that petitioner, in obtaining money from Carter, knew he was dealing with Carter in the latter's capacity as an officer of Pilsener, acting for the corporation. The money was paid at the Pilsener office. Carter was not only the president of Pilsener, "he was the sole official, boss of the Pilsener Brewing Company" (R. 20). In view of the numerous contracts negotiated between Carter and petitioner, there could be no serious doubt that petitioner knew he was dealing with an employer when he sought money from Carter.

Petitioner argues (Pet. 25-29) that under the statute as it read at the time of the offense Carter must be distinguished from Pilsener. The legislative history of the 1959 amendment cited by petitioner (Pet. 25-26) seems to indicate primarily an intent to facilitate proof. But, in any event, the evidence here plainly supports the finding that Carter, the president of Pilsener, was "acting as an agent of an employer, directly or indirectly," within the purview of the original Act. § 2 (*supra*, p. 3).

3. At the beginning of the trial, when evidence was offered as to the write-off by City Products, counsel objected on various grounds. The court ruled that it would accept the evidence and that if the

evidence was not connected with a particular defendant, the court would ignore it with respect to that defendant (R. 51-52). When the government rested, defense counsel requested the court to make rulings, noting that "your Honor has reserved rulings with respect to a number of details" (R. 199-200). The government suggested that the court should not be asked to rule on the evidence piece by piece with no guidance from counsel (R. 200). Defense counsel stated they were prepared to offer guidance (R. 201), but pursuit of this problem was abandoned in subsequent discussion and never specifically renewed (R. 201-204).

Petitioner does not now point to any particularized objection to competency or admissibility of specific evidence as to which ruling was deferred. Rather, he complains generally about the trial judge's practice of deferring ruling and his failure to ultimately dispose of the objection. But, as the judge noted in his initial ruling (R. 51-52), the government must start somewhere in its proof, and evidence which does not immediately seem relevant may become so later, as the case unfolds (see R. 29, 51). Under these circumstances, and in the absence of a jury, it was proper to defer ruling and reasonable to expect each defendant to specify, at the end of the government's case, the evidence which was claimed not to relate to him. Having failed to make that specification, petitioner cannot complain. Moreover, there is still no indication that incompetent evidence was admitted against him.

Petitioner also claims that it was error to admit Form 870 and the related evidence of his payment of income tax on the $4,500 received from Carter. (Pet. 30-35). However, all factual evidence showing how the parties considered this transaction was competent evidence relevant to the issue of intent, which, of course, must be shown by circumstantial evidence. The waiver form, as such, was of no importance. It came in as part of the total evidence that in 1960 the $4,500 was treated by petitioner as money received and not as a loan, an important issue if loans were not covered by the statute under which he was charged.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JOHN J. FELICE, *Petitioner*

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UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

It is with great respect and humility that the petitioner is constrained to reply to the Brief in order to serve justice as contemplated by the Constitution. The arduous task of framing language when taking issue with a branch of our Government is harrowing but cannot be eliminated since, in the petitioner's opinion, irreparable harm may be sustained not only by him but by law as a result of the misleading avoidance of the issues in this case to

which the Government has resorted in its Brief. Mindful of the responsibility that the Solicitor General's Office has to other Government agencies, we do not take specific issue with it as to its motives in this case, but must nevertheless not compromise our endeavor to meet the requirements of law and justice in order to avoid regretful but unavoidable expressions and conclusions.

I. THE BRIEF IN GENERAL

Because of the following factors, the Brief for the United States in Opposition, hereinafter mentioned as the Brief[1] offends the requirements of justice and fairness:

1. It misstates facts to the extent that it gives half-truths in the "Statement" (B. 3-5).

2. Although there is nothing of extortion, demand, pressure or intimidation in the record, the Brief presents (B. 4, 5) inadmissible, incompetent and hearsay evidence in such a manner as unfairly to indicate that the loan from Carter to petitioner was not a loan.

3. It avoids mentioning pertinent facts necessary for a clear understanding of the case with regard to the evidence.

4. It takes out of context statements in the Petition for Certiorari.

5. It is not responsive to the important questions of law raised in the Petition.

Other serious defects in the Brief will be pointed out below. Under the circumstances, the petitioner above regrets that he feels constrained to file this Reply Brief and thereby increase the many time-consuming responsibilities of the Court.

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[1] The Brief is also designated "B"

II. GOVERNMENT'S COUNTERSTATEMENT OF FACTS

1. On page 4 of the Brief, the reversal by the Court of Appeals of the City Products Corporation's conviction is attributed to a single fact, i.e., that "City Products had no employees." This is a misleading and inaccurate half-truth. The Appellate Court considered and discussed additional evidence as a basis for the reversal. In the Brief's "Argument," it is true, part of this evidence is discussed (B. 6) but in the "Statement" of facts (B. 3-5) that precedes the "Argument" only the above-mentioned single fact is referred to in the obvious hope that the cumulative effect of this half-truth and certain other incompetent evidence discussed in the "Statement" would create a picture of culpability before the "Argument" is reached by the reader. As a matter of fact, the entire "Statement" is predicated on this misleading pattern of creating a nebulous and insidious sense of guilty conduct on the part of the petitioner.

To further this purpose, the "Statement" also presents (B. 4, 5) incompetent and hearsay evidence. But worse than that it presents certain half-truths in such a manner as to raise serious question whether such advocacy is worthy of a branch of our judicial system even to exculpate judicial decision. Thus, the Brief states (B. 5) that "Carter told Nero to keep the transaction confidential." But it does not state that Nero, in referring to this "transaction," said that Carter had told him that he was going to "loan" money to the petitioner (Appendix, page 25a). Nor that Nero testified that Felice "secured a personal loan from Mr. Carter." (Ibid., p. 80a). Nor did the Brief state the most important fact that the cause for the instruction to keep the loan "confidential" was that Carter "didn't want a lot of people to make loans if information like this got out." (Ibid., p. 83a). The misleading unfair and insidious implication that the instruction was made because the transaction was a gift and not

a "loan" is obviously intended to be veiled in this half-truth of the Brief. This method that pervades the Brief makes it imperative to read the petition with the great care that the Court gives to important deviations from due process of law and which it is submitted are shown by the petition. Nor does the Brief mention that loans by City Products to employees were likewise treated as confidential. (Ibid., p. 85a).

The Brief is also unfair and misleading in stating that "Carter had negotiated a number of labor contracts with petitioner." (B. 4). It tortuously avails itself of the record, which is misstated, and does not reflect the Government's testimony regarding "negotiation." On page 178a of the Appendix, which is referred to in the Brief (B. 4), it is specifically stated that contracts were *negotiated by John D. Marshall*, Executive Secretary of the Brewers Association of Cleveland and *unions* for the *breweries* in Cleveland, which negotiated area contracts. It is not stated in the record there that those contracts were negotiated by Felice and Carter *per se* as the Government contends, although Felice and Carter were signatories to them.

The reference in the "Statement" (B. 5) concerning the improper and incompetent evidence on the income tax will be discussed below.

III. QUESTIONS PRESENTED

The Petition raises seven important questions. An examination of the "Argument" (B. 5-9) shows that the Brief again misleads and misstates. It is argued (B. 5) that there is no merit in the "Petitioner's claim that the reversal of the conviction as to City Products requires a reversal as to him". This is a reference to the First Question in the petition. This, however, is a misleading misstatement of that question. A reading thereof on page 2 of the Petition will show that the question does not refer to the mere fact of the reversal but to a great deal of

evidence *that was taken into account by the district court in convicting the petitioner as well as City Products* and the other two defendants in the case and which evidence was completely discarded and discredited by the Court of Appeals. As pointed out in the petition (page 14), the fact that the discarded evidence was considered erroneously by the trial court raises serious doubts before this Court whether the petitioner would have been convicted in the absence of the evidence discarded by the Court of Appeals.

A reading of the Argument will also show that other questions are glossed over, adroitly veiled, unanswered and even distorted.

IV. ARGUMENT

1. Acquittal of City Products

The first contention in the Argument (B. 5), which deals with the acquittal of City Products, has been answered above.

2. Insufficiency of the Evidence

The second contention states (B. 6) that "as the court of appeals held, the evidence amply supports the conviction". This is the only reference to the Court of Appeals in connection with this issue. On page 6 of the Brief it is stated: "Accordingly, there was sufficient evidence to support the conviction" of the petitioner. The only discussion of evidence in support of this erroneous conclusion which precedes the word "Accordingly" is (1) another improper conclusion from the payment of income tax which will be discussed below and (2) the fact that the loan had not been repaid. No mention is made of Felice's inquiry of Carter with respect to repayment or of the overwhelming direct evidence and other evidence discussed in the petition (pp. 42-52) which shows the transaction to be a loan. The Brief refers (B. 6) in this connection to pages

42-52 of the petition but a reading of these ten pages will convince this Court not only that the evidence fails to support the petitioner's conviction but will lead to the inescapable conclusion that the Brief has made no serious attempt to disprove the petitioner's contentions in these ten pages that there is not sufficient evidence to support the trial court's finding, unrectified by the Court of Appeals, that the petitioner received a gift and not a loan. And the Court of Appeals held that, unless the trial court "could find, beyond a reasonable doubt", that the transaction was not a loan but an "outright payment", the petitioner must be acquitted (Pet., p. 61).

3. Wilfulness and Knowledge

As to the alleged wilfulness and knowledge by the petitioner that the loan was made by Pilsener Brewing Company, the Brief refers (B. 7) to three things which totally fail to support the said contention. They are:

(a) "The money was paid at the Pilsener office." The Brief states this but fails to add that it was Carter who asked the petitioner to come to his office to receive the money and give the note. The petitioner had nothing to do with the choice of the place. A borrower may go to his friend's office, without arriving at the conclusion that the loan is made not by his friend but by his friend's employer. Would the employer be legally responsible for loans made to employees at the latter's office if Carter had borrowed money personally.

(b) According to the Brief (B. 7), Carter was the "boss of the Pilsener Brewing Company". We find, however, that Carter was not the boss in regard to this transaction. He had to obtain the approval of Zeidler who was a responsible officer of City Products, the parent company of Pilsener (App., p. 448a). And yet the City Products' acquittal by the Court of Appeals was in spite of the trial court's finding that Zeidler had approved a gift and not a loan.

(c) "Negotiation" of contracts between Carter and petitioner is also mentioned in the Brief (B. 7). This point has been answered above.

4. Retroactive Amendment of Statute

The petition's serious constitutional issues as to retroactivity raised by the sixth question (Pet., pp. 25-29) are unfairly reduced to the question whether "Carter must be distinguished from Pilsener". The only discussion of the evidence in support of this unwarranted conclusion is a dogmatic statement that the evidence supports the finding that Carter in making the loan was "acting as an agent of an employer". There is no discussion of the overwhelming evidence against any assumption that this was not a loan from Carter as a friend. There is not even an attempt to discuss the important legal points raised in five pages of the petition (pp. 25-29). All these points are disposed of by again dogmatically asserting a conclusion, without any reasoning at least to attempt to support it, to the effect that "The legislative history of the 1959 amendment cited by petitioner (Pet., pp. 25-26) seems to indicate primarily an intent to facilitate proof." It is submitted that a mere reading of the 1959 amendment would suffice to show that it went beyond a procedural question of evidence and proof. In the language of the Court of Appeals, the 1959 amendment was intended to cover "loans and lending", transactions not proscribed by the unamended statute (Pet., p. 59).

5. Violation of Due Process of Law

Leaving the last paragraph of the Brief for later discussion, the rest of the Brief is an unfair distortion of another serious constitutional question raised by the petitioner as well as a plethora of artful half-truths that do not do justice to the petitioner.

The first two sentences of this part of the argument (B. 7) would give the improper impression that the objected

evidence as to the write-off by City Products of petitioner's note was the only one in which the trial court reserved ruling as to admissibility of objected evidence subject to subsequent connection. This is not a fact. An examination of the record will show several such instances and even the Court of Appeals used the plural number in referring to instances where the "District Judge reserved his rulings" (Pet., p. 70). Furthermore, the Brief states (B. 8) that "there is still no indication that incompetent evidence was admitted against him [the petitioner]". What a remarkable statement! The reception into evidence as against the petitioner of the charge-off was not only *incompetent* evidence but prejudicial error. It was not only a unilateral action by City Products but *remote in time, 1960*, from the loan in 1956, as well as hearsay. Instances of the admission of numerous improperly admitted facts and evidence are given on page 51 of the petition.

The Brief also states (B. 8) that "it was proper to defer ruling". This is not what the petitioner claims to be improper. Of course, a court has the right to defer a ruling subject to subsequent connection of the evidence. What is complained of is that the court failed to rule whether the line of objected testimony had been connected and *never* ruled on any ground so far as the objected evidence was concerned.

The Brief endeavors to taint (Ibid.) the record with respect to this problem by saying that it was abandoned by petitioner. It is hard indeed to see how abandonment could reasonably be contended when, as already stated, the record is replete with repeated objections and when this problem was treated by the Court of Appeals (B. 70).

The Brief's statement (B. 8) that "the government must start somewhere in its proof" is distorted when it is offered as a justification of the judge's failure ultimately to rule on whether the objected evidence had been connected or was properly objected to by petitioner.

The above discussion under number 5 relates to the point made by petitioner that the Court of Appeals has so far sanctioned such conduct by the trial court "as to call for the exercise of this court's power of supervision" in order to remedy a violation of the due process of law resulting from the trial court's conduct of the trial. This point is discussed and fully documented and paginated on pages 17 to 24 of the petition. It is quite significant that, in the Argument, the Brief cites in parentheses *the total number of pages in the petition* in which there is discussion of Point I (Pet., pp. 12-16, cited on B. 5), Point III (Pet., pp. 25-29, cited on B. 7), Point IV (Pet., pp. 30-35, cited on B. 9), Point V (Pet., pp. 35-41, cited on B. 7) and Point VI (Pet., pp. 42-52, cited on B. 6). No such citation of the pages in the petition devoted to Point II (Pet., pp. 17-24) is made in the Brief? And one is of course struck by this omission and is led to seek the reason therefor. Was it an adroit way of avoiding calling attention to the petition's cohesive and reasonable attack against a serious violation of due process of law? Was it hoped that, by calling attention in the Brief to fragments of Point II and not to the fundamental constitutional issue raised by the petitioner, the chance of successfully avoiding the combined weight of the totality of the issue would be enhanced? Be that as it may, by the fragmentary treatment of this very important Point II, the Brief has again artfully avoided a serious discussion, for the benefit of the Court, of many points, including the question of how is counsel properly to defend his client when the trial court admits evidence "either as being relevant or *as tending* to either make something else relevant *if and when it does*, or become relevant by supplementary evidence . . ." (Pet., p. 19). How is counsel to disentangle such labyrinthian ruling? Or to know which one of these three different criteria the court relied upon in admitting objected evidence when the court would rule that such evidence was admissible? Or to know whether the evidence applied to the one of the four defendants with whose de-

fense he was entrusted? Such criteria afforded the judge an *easy* method of avoiding rulings; but it deprived defense counsel of an opportunity to (1) exclude prejudicial and improper evidence, (2) prepare and present a proper defense and (3) lay a foundation for appeal, in view of the ingeniously generic and sweeping language of the court.

For the other important issues involved in this Point II, the Court's attention is invited to pages 17-24 of the petition.

Significantly it may be pointed out that the District Court and the Brief attempted to justify the fact that rulings had not been made by the District Court because that Court was not required to catalog the evidence. The Brief, in an endeavor to support this fact, poignantly focused to this Court *abandonment* by the petitioner with respect to this point. Regardless of the exculpatory endeavors, counsel for petitioner, in compliance with the prejudicial rulings by the District Court, did catalog, all of the evidence, irrelevant, hearsay and that envisaged by other objections. The motion for judgment of acquittal served all of the requirements posed by the District Court and the court summarily denied the said motion. The Court of Appeals recognized the impropriety of the District Court's failure to rule on questions of evidence and indicated that it posed a tremendous hardship upon counsel in preparing defense of his client, but the Appeals Court also failed to recognize that the petitioner had preserved the objections on evidence by the motion for the judgment of acquittal. The petitioner does not mean to imply that the Solicitor General's Office in its Brief or in its attempt to exculpate what was done in the motion for judgment of acquittal sanctioned or knowingly avoided the recognition that the petitioner never abandoned the objections made in the District Court for failure to rule.

6. Form 870

The last paragraph of the Argument (B. 9) refers to Form 870 and the payment of income tax on the $4,500.00. This paragraph is without merit. It is (1) self-contradictory, (2) contradictory of prior governmental assertions and court findings, (3) misleading, (4) evasive, (5) remote in time, and (6) should not have been admitted in a criminal case because of its highly prejudicial character.

(a) The paragraph states Form 870 "was of *no importance.*" (Emphasis supplied. B. 9). Yet, in the very next sentence, it is stated that the issue whether the petitioner treated the $4,500 as "money received and not as a loan" is "*an important issue* if loans were not covered by the statute under which he was charged." (Emphasis supplied, B. 9). The Court of Appeals found that it was important to determine whether the transaction was a bona fide loan, since a loan would not violate the statute. In Form 870, the $4,500 is treated not as a loan but as income, as money received. How could it therefore reasonably be contended that Form 870 was not important?

In connection with this point, the evidence in the record is plain that the transaction was a loan (Appendix, p. 134a). Nonetheless, the Government urged the $4,500 was taxable income to the petitioner. (Ibid., p. 126a). Finally, on advice of his tax attorney, one Cozza, petitioner agreed to execute Form 870 and paid the tax (Ibid., pp. 296a, 297a, 302a). Petitioner did not easily accede but ultimately conceded to his attorney's recommendations (Ibid., p. 305a). This event occurred in 1960, almost four years after the original transaction in 1956 (but prior to the institution of this proceeding). In relation to the intent of the petitioner to make a loan in 1956, the remoteness in time of the 1960 event as a basis for an inference contradictory of such intent, especially in the face of all the overwhelming evidence to the contrary discussed in the petition, and par-

ticularly on pages 42 to 52 thereof, is too apparent to need further comment.

(b) The paragraph also contradicts statements by both the District Court and the Court of Appeals. The former regarded such evidence as "significant". (App., p. 446a). As stated on pages 30 and 31 of the petition, if the Court of Appeals meant that the admission of the evidence in question was non-prejudicial but cumulative, such finding would be inconsistent with the above statement of the trial court and, in fact, with the heavy weight given by the Court of Appeals itself to such evidence (B. 31).

The importance of this evidence thus cannot be gainsaid. And if Form 870 was inadmissible, a prejudicial error, unrectified by the Court of Appeals, was committed. Was it admissible? The Government conceded that, if Form 870 were a "compromise", it would have been "incompetent evidence" (App., p. 434a), because "public policy states that the courts follow the rule that the courts encourage compromise". (*Ibid.*) Then, Government counsel argued that, because petitioner had paid what the Government had asked, it was not a compromise (*Ibid.*, pp. 247a, 248a). This argument is unsound. The closing out of the years involved, 1954, 1955 and 1956, and the dropping of other questions raised are sufficient to present a clear picture of compromise. There was mutuality of accommodation, there was give and take, which are the very essence of compromise. To avoid the uncertainties of litigation should he refuse to pay tax on the basis of the Government's insistence, the petitioner accommodated the Government's adamant position. On the other hand, to avoid the uncertainties of litigation and get the certainty of payment, the Government gave up the possibility of additional payments by way of penalties. Furthermore, the same Government counsel, who denied that there was compromise between petitioner and the Government, in his examination of one of his own witnesses, Meister, an Internal Revenue agent,

used the words "proposed adjustments" (Ibid., pp. 130a, 131a, 132a); "settlement" (Ibid., p. 132a); "adjustment" (Ibid., p. 135a); the result of which is Form 870, which the same witness said "is the agreement we request the taxpayer to sign for any additional tax assessment". (Ibid., p. 141a).

The chameleonic characterisations by the Government of this evidence is remarkable. In the Brief, Form 870 is stated to be "of no importance" (B. 9). In another Government brief (Pet., p. 34) it is alleged that Form 870 was not offered as establishing tax liability of petitioner but to show how the controversy was terminated (Pet., p. 34). While the latter contention is erroneous (Ibid.), it shows that the Government considered Form 870 important as evidence, at least for the alleged purpose. What is the reason for this shifting and ever-changing position with respect to Form 870 and does such change suggest responsible presentation of evidence in the interest of justice? Other important issues concerning this evidence, issues which have not been met in the Brief, may be found on pages 31 to 35 of the petition. Also, *arguendo*, if there were no Form 870 and all of the evidence complained of was allowed as proper, could there have been a conviction?

CONCLUSION

For the foregoing reasons, it is respectfully reiterated that the petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 955

JOHN J. FELICE, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR REHEARING OF THE ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

P. D. MAKTOS,
JOHN MAKTOS,
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Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petitioner John J. Felice, respectfully prays that, pursuant to paragraph 2 of Rule 58 and Rule 19 of the Revised Rules of this Honorable Court, a rehearing be granted of the order of this Honorable Court, entered in this case on May 13, 1963, denying the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

The petitioner respectfully shows as follows:

During the petitioner's trial in the United States District Court for the Northern District of Ohio, Eastern Division, the *admission of Internal Revenue Form 870* was objected

to by petitioner as being inadmissible evidence. The District Court nevertheless *admitted* it and held this evidence to be "*significant*" in its opinion and in arriving at its decision. The aforesaid Court of Appeals, in this case, *sustained* the District Court's admission of this evidence in disregard of petitioner's objection and *contrary* to the decision of the Court of Appeals for the Eighth Circuit in the case of *Clark* v. *U. S.*, 211 F. 2d 100, in which that court *held Internal Revenue Form 870 to be inadmissible* and which case had been cited by petitioner. See also *Beck* v. *U. S.*, 298 F. 2d 622, 633 and *Schneider* v. *Kelm*, 137 F. Supp. 871, 875.

Petitioner, therefore, in compliance with paragraph 2 of Rule 58 of the Revised Rules of this Honorable Court, prays that Internal Revenue Form 870 and the *conflicting opinions* of the aforementioned circuit courts fall well within the purview of the said paragraph 2 and of Rule 19 and of the said Revised Rules.

RELIEF

For the foregoing *substantial* reasons, petitioner prays that a rehearing be granted in this case.

Respectfully submitted,

P. D. Maktos,
John Maktos,
3700 Massachusetts Ave., N.W.
Washington 16, D. C.

Moses Krislov,
566 Hanna Building
Cleveland, Ohio

Counsel for Petitioner

AFFIDAVIT

City of Washington
District of Columbia } ss:

I, the undersigned, P. D. Maktos, counsel for petitioner, John J. Felice, in the above-captioned case, being duly sworn, declare and say:

1. On May 13, 1963, the Supreme Court of the United States denied petitioner's petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in the aforesaid case.

2. On May 14, 1963, the petitioner, pursuant to paragraph 2 of Rule 58 of the Revised Rules of the said Court, filed before the Honorable Potter Stewart, an application to stay the order denying petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit, pending the filing of a petition for rehearing of the said order denying the writ of certiorari.

3. The petitioner also filed, on May 15, 1963, before the said Court, a petition for rehearing of the order denying petition for a writ of certiorari.

4. The affiant affirms that the petition for rehearing was filed in good faith and not for dilatory purposes. He also affirms that the petition was filed for good and substantial reasons in that the issue of law referred to in the petition for rehearing had not been poignantly raised in the petition for certiorari.

5. In the light of the fact that the co-relationship between the word "poignantly" and the aforesaid Rule 58 and 19 might be subject to criticism so far as the aforesaid petition for rehearing is concerned, your affiant, mindful and consciously aware of the responsibilities of this Court, is constrained to explain in this affidavit the application of the issue of law raised in the petition for rehearing with reference to its substantial compliance with Rules 58 and 19.

a. Though the question of Internal Revenue Form 870 was raised before the District Court as a factual and evidentiary matter and preserved before the Court of Appeals and incorporated in the petition for certiorari to the Supreme Court of the United States, the question regarding Internal Revenue Form 870 had never been raised as a matter of conflict between opinions of courts of appeal.

b. Your affiant, having filed petition for certiorari before the court of last resort, failed in the pursuit for the justice sought for the petitioner, by incorporating Internal Revenue Form 870 as being an issue at law which raised questions of evidentiary value rather than of conflicts between courts of appeal.

c. Your affiant, also mindful of Mr. Justice Brennan's statement that "many of our most precious guarantees of liberty and human dignity are at hazard in criminal procedures." (An address on the occasion of the celebration of the Golden Anniversary of the Harvard Legal Aid Bureau, Harvard Law School, 1963.), and believing that in this case not only human liberty and dignity, but law and justice are at hazard, submits the petition for rehearing in the hope that the court of last resort would not be critical of your affiant should they consider Rule 58 at variance with your affiant's interpretation.

The affiant prays this Court's indulgence with respect to the length of this affidavit.

Respectfully submitted,

P. D. MAKTOS
Counsel for Petitioner